Supreme Court, U.S.
FILED
SEP 16 2008
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-452

IN THE

Supreme Court of the United States

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,
Petitioners,

v.

CACI, INTERNATIONAL INC., CACI SYSTEMS INTEGRATION, INC., CACI, INC – FEDERAL, AND J.P. LONDON
Respondents,

THOMAS M. MARSHALL,
Defendant.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a carefully executed scheme by an attorney that successfully conceals a client's unlawful transfer and conversion of stolen software, by:

a) commencing a preemptive countersuit restricted to the outdated known facts pleaded in such a way so as the judgment obtained acts as res judicata to defeat the first action,

b) suborning and offering false evidence that concealed the secret transfer,

c) preparing and proffering a false expert report based on the outdated known facts to establish that a transfer that had already occurred was not possible,

d) impeding the opposing counsel's ability to obtain the truth by communicating directly with government officials on numerous occasions who throughout fail to divulge the unlawful conduct, and

e) using the principles of issue preclusion based on the tainted judgment to defeat all other actions

reach the threshold of subversion of the integrity of the court itself as set forth in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944), such that an officer of the court has committed a fraud on the court requiring a reversal of the results obtained by the fraudulent conduct?

PARTIES TO THE PROCEEDINGS

The party named in the caption:

- **Thomas M. Marshall**

is not a party before the District Court, or the Court of Appeals, and will not be a party to this Petition.

RULE 29 (6) STATEMENT

Pentagen Technologies International Limited has no parent corporation, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29 (6) STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES xi
PETITION FOR A WRIT OF CERTIORARI 1
CITATION OF OPINIONS AND ORDERS 1
BASIS FOR JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
1. Constitutional Provisions 2
STATEMENT OF THE CASE 3
Introduction 3
1. PTI Establishes Title To The Purloined Software 3
2. CACI'S Pre-Emptive Counter-Attack 4
3. CACI's Counsel Transgresses The Limits Of Zealous Advocate 5
4. The Fruits Of Deception 6
STATEMENT OF FACTS 7
1. Claim Seeks Return Of All Derivative Versions Of Stolen Software Notwithstanding CACI's Counsel's Foul Play 7
2. Facts Publicly Known To 2000 7
A. 1990: CACI obtains stolen MENTIX source code from gunmen 7
B. 1990-1993: PTI sued RDG; 3090 version developed/transferred to U.S. 8
C. July 1993: RDG acknowledges PTI's title in judgment 9
D. July 1993: PTI sues CACI for conversion in New York 9

3. CACI'S Counsel's defeats N.Y. conversion claim by obtaining declaratory judgment in EDVa limited to outdated known facts only. 9
A. CACI's Counsel's Scheme was simple, yet sophisticated.....9
B. CACI's Counsel deliberately commenced a new proceeding limited to outdated known facts 10
1) Before filing new action, Counsel checked with Mr. Brasseur as to "communications with PTI" 10
2) CACI then filed for declaratory relief in EDVa.....11
3) EDVa Action termed as "deliberate" limitation of claim by Judge Mukasey. ...11
C. CACI's Counsel made specific misrepresentations that no derivative software exists.....12
1) Discovery was undertaken in EDVa for both actions.....12
2) CACI's Counsel's May 6, 1994 Letter 12
3) NY judgment confirms evidence of derivative Version not produced.....13
D. CACI's Counsel suborned a false U.S. Government response to PTI's Subpoena.....13
E. During EDVa Discovery, CACI's counsel took all necessary steps to limit PTI's ability to obtain evidence from the U.S. Government.....15
F. CACI's Counsel then Manufactured a False Expert Opinion that 3090 version could not be developed. 16
1) CACI's Counsel spent more than **fifty hours** on preparation of Expert Opinion 16

2) CACI's Counsel controlled what expert was shown: secretly developed 3090 Version of the software was not reviewed. 17
3) 2000 evidence establishes that Expert Opinion was wrong; a 3090 version with the same characteristics as offered in SBIS had been secretly tested by the U.S. 17
G. CACI's Counsel obtained EDVa 1994 Decision as planned. 18
H. CACI Counsel's continued to thwart PTI's counsel efforts to uncover evidence. 19
I. CACI's Counsel Then Obtained Judge Mukasey's July 1996 Order Using Res Judicata. 20
4. Using Mukasey Decision, CACI's Counsel Defeats PTI In Other Actions Using Issue Estoppel. 22
A. Used Issue Preclusion, knowing the decisions were based on incorrect facts 22
B. CACI's Counsel then assisted in obtaining misleading 1996 Brasseur Witness Statement. 22
C. Secret test Revealed; 2000 Brasseur Cross Examination establishes CACI's Counsel subterfuge. 23
D. Brasseur 2000 Evidence undisputed. 24
5. PTI'S Efforts After 2000 To Unravel Manifest Injustice 24
A. PTI presented New Evidence to courts without success. 24
B. PTI presented Rule 60(b)(6) to EDVa who rules evidence only "inference" as to CACI. ... 25
C. PTI obtains further evidence proving that CACI had transferred the 3090 Version of MENTIX to the U.S. 25

D. PTI's Counsel sanctioned and prohibited from further appearance; Independent Counsel appointed 26
E. Turnover proceedings 26
F. District Court Ruling in Rule 60(b)(6): 27
G. Court of Appeals ruling in Rule 60(b)(6). 27
REASONS FOR GRANTING THE WRIT 28
1. The Order is a final order for the purposes of 28 U.S.C. § 1291 28
2. The Court Should Update and Clarify *Hazel-Atlas*. 28
A. The Circuit Court Should Have Granted Relief Under Rule 60(b)(6). 29
B. Variance Between Circuits As To Definition Of "Fraud On The Court" 30
1) Variance of Circuits 30
2) Second Circuit's Opinion in the case at bar. 32
3. Key ingredient of "Fraud on the court" is that "judicial machinery cannot perform in the usual manner its impartial task of adjudging cases" by reason of conduct of counsel. 32
A. Law 32
B. CACI's Counsel's offending conduct made it impossible for the machinery of justice to perform properly 34
4. Other cases supporting PTI's interpretation. . 35
5. PTI's Evidence Would Change Outcome of the SDNY Opinion. 36
6. Unnecessary To Open Judgment in EDVa. 37
7. A gross miscarriage of justice has been committed; CACI's Counsel's misconduct should not be condoned; all derivative version of PTI's software should be returned. 37
CONCLUSION 38

APPENDIX A NEW YORK CONVERSION ACTION V. CACI A-1
1. "Fraud on the Court" Motion A-1
a. Court of Appeals for the Second Circuit Order Dated June 18, 2008..... A-1
b. S.D.N.Y Order of Judge Gerald E. Lynch dated February 23, 2007..... A-6
c. S.D.N.Y. Order Denying Motion for Reconsideration of Judge Gerald E. Lynch dated March 6, 2007 (endorsed)..... A-16
2. Judge Mukasy's Decisions A-17
a. Judge Mukasy's Decision dated July 15, 1996 ..... A-17
b. Order Granting Motion For Reconsideration Entered By Judge Mukasey Dated August 1, 1996 ..... A-59
APPENDIX B NEW YORK CONVERSION ACTION v. RUNAWAY A-63
1. Runaway Action Judgment entered August 2, 1993 by Judge Sprizzo A-63
2. Judge Sprizzo's Orders October 2005 ..... A-75
3. Judge Sprizzo's Order June 2006..... A-85
APPENDIX C EASTERN DISTRICT OF VIRGINIA DECISIONS A-90
1. Judge Brinkema's 1994 Decision United States District Court for the Eastern District of Virginia, Alexandria Division A-90
2. Judge Cacheris Decision dated April 10, 2002 ..... A-108
APPENDIX D AFFIDAVITS IN SUPPORT OF 2006 MOTION TO JUDGE LYNCH A-127
1. Affidavit of John C. Baird in Support A-127
2. Affirmation of Joel Z. Robinson in Reply ... A-148

3. Evidence Filed As To CACI's Counsel's Conduct A-158
a. CACI's Complaint in EDVa filed December 23, 1993..... A-158
b. Letter CACI's Counsel to PTI's counsel September 10, 1993..... A-161
c. Letter from CACI's Counsel to PTI's Counsel dated 12 April 1994..... A-163
d. Memorandum Report of FBI prepared April 18, 1994 relating to PTI's Complaint..... A-164
e. May 6, 1994 Statement from CACI's Counsel re: CACI software:..... A-169
f. Time Sheets Attached to affidavit of CACI's Counsel's Affidavit dated July 8, 1994 filed in E.D.Va action..... A-171
g. Dr. Rotenstreich's Invoice produced by CACI's Counsel in affidavit filed in E.D. Va dated July 8, 1994..... A-174
h. Attachment of material sought from AISSAA under Subpoena dated March 24, 1994 returnable April 1, 1994..... A-175
APPENDIX E ADDITIONAL EVIDENCE FILED IN SUPPORT OF MOTION UNDER RULE 60(B)(6) A-180
1. FOIA Request dated August 24, 1993 requesting MENTIX Test Results (File Copy) and Response A-180
2. Letter from IBM to CACI dated November 8, 1993 re: Use of RENovate on SBIS Program A-182
3. Letter from FBI to Counsel dated May 24, 1994 re DoJ's Investigation Activities..... A-183

4. "Gag" Letter from U.S. Attorneys' Office (SDNY) to PTI's Counsel dated June 16, 1995 ..... A-185
5. Conflicting Evidence Filed in English High Court Action A-187
   a. Letter from AMC May 17, 1990: MENTIX Evaluation. A-187
   b. CACI's Internal Memo dated 30 March 1990 re visit and assessment of MENTIX A-189
   c. CACI's White Paper to AMC Presented October 1990 ..... A-190
   d. CACI Briefing to AMC on August 5 1991 using MENTIX with RENovate A-196
   e. Certificate of Secretary of State of New York re CACI Inc.-Federal 1981 Registration in New York State A-197
   f. Govt 1996 Witness Statement filed in English Action A-198
   g. FOIA Request to Department of Army dated February 3, 1997 ..... A-202
   h. Responses to the FOIA Request dated February 3, 1997 ..... A-203
   i. Correspondence between CACI's Counsel and PTI Counsel, April1997 re Brasseur Evidence A-205
   j. Decision of English High Court November 18, 1999 ordering the Letters of Request A-213
   k. Relevant Portions of Cross-Examination of E.F. BRASSEUR of AMC, April 2000 ..... A-215
   l. Evidence of Runaway given by Robert O'Brien on November 26, 2002 ..... A-221

m. Relevant Provision of the SBIS Contract A-223
n. Miscellaneous Filed Pleadings A-224

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment V 2

CASES

Bulloch v. United States, 95 F.R.D. 123 (D. Utah 1982) 36

Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir.1976) 30, 31

Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir.1993) 30

Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 (1st Cir.1995) 31

Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir.1988) 31, 32

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 675 F.2d 1349, 1357 (4th Cir.1982) 33

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) ..... i, 29

Herring v. U.S. 424 F.3d 384 (3rd Cir.2005) *cert den*, 547 U. S. 1123 (2006) 29

Kerwit Med. Prods., Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (11th Cir.1980) 32

Kupferman v. Consolidated Res. & Mfg. Corp., 459 F.2d 1072 (2d. Cir. 1972) 35

Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895 (2d Cir. 1985) 32

Pentagen Technologies Intern. Ltd. v. CACI Intern. Inc., Slip Copy, 2007 WL 586636, S.D.N.Y., February 23, 2007 (Nos. 93 Civ. 8512(GEL), 94 Civ. 0441(GEL), 94 Civ. 8164(GEL).) 1

Pentagen Technologies Intern. Ltd. v. CACI International, Inc. et al, 2008 WL 2474641, ,C.A.2 (N.Y.), June 18, 2008 (Nos. 07-1576-cv, 07-1581-cv, 07-1582-cv.) 1

Pentagen Technologies Intern. Ltd. v. U.S., 2003 WL 1977386 (2nd Cir. (N.Y.) 1

Pentagen Technologies v. CACI International, Inc et al. 1996 U.S. Dist. LEXIS 9903 and 1996 U.S. Dist. LEXIS 10907, (1996, SDNY) 1

Pentagen Technologies v. United States et al. 103 F.Supp.2d 232 (2001, SDNY) 1

Pentagen Technologies v. United States et al. 172 F.Supp.2d 464 (2001, SDNY) 1

Pumphrey v. Thompson Tool Co., 62 F.3d 1128, 1130 (9th Cir.1995) 31

Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir.1978) 31

Runaway Development Group S.A. et al. v. Pentagen Technologies Int'l Ltd., et al., 91 Civ 5643, (JES) SDNY 1

Runaway Development Group, S.A., v. Pentagen, 91 Civ. 5643 (JES) 3

Runaway Development Group, S.A., v. Pentagen, 91 Civ. 5643 (SDNY, JES) 9

Trehan v. Von Tarkanyi, 63 B.R. 1001 (SDNY 1986) 36

Weese v. Schukman, 98 F.3d 542, 553 (10th Cir.1996) 31

STATUTES

17 U.S.C. §101 4

17 U.S.C. §106 ..... 4, 9

28 U.S.C. §1254 (1) (2002) 2

RULES

Fed. R. Civ. P. 11 2

Fed. R. Civ. P. 60 (b) (6) ..... *passim*

Sac. Sup. Ct. L.R. 10.00(B), (A) 6

TREATISES

Moore's Federal Practice 3d § 60.21[4][a] 29

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Pentagen Technologies International Limited ("Pentagen" or "PTI"), requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

CITATION OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Second Circuit is officially reported as *Pentagen Technologies Intern. Ltd. v. CACI International, Inc. et al*, 2008 WL 2474641, C.A.2 (N.Y.), June 18, 2008 (Nos. 07-1576-cv, 07-1581-cv, 07-1582-cv.) and appears in Appendix hereto at A1-A6. The opinion of the United States District Court for the Southern District of New York denying the Motion for Relief from Final Judgment is officially reported as *Pentagen Technologies Intern. Ltd. v. CACI Intern. Inc., Slip Copy, 2007 WL 586636, S.D.N.Y.*, February 23, 2007 (Nos. 93 Civ. 8512(GEL), 94 Civ. 0441(GEL), 94 Civ. 8164(GEL).) appears at A6-117. The opinion in the case sought to be re-opened is officially reported as *Pentagen Technologies v. CACI International, Inc et al.* 1996 U.S. Dist. LEXIS 9903 and 1996 U.S. Dist. LEXIS 10907, (1996, SDNY) appears at A17-A63.

This case arose after Petitioner had obtained a judgment in *Runaway Development Group S.A. et al. v. Pentagen Technologies Int'l Ltd., et al.*, 91 Civ 5643, (JES) SDNY, which is not officially reported, and which appears at A63-A90.

BASIS FOR JURISDICTION

The Decision denying the Rule 60 (b)(6) motion was issued in the District Court on February 23,

2007; a Notice of Appeal to the Court of Appeals was filed on April 13, 2007. The Court of Appeals dismissed the Appeal by an unpublished Summary Order filed June 18, 2008. In accordance with Rule 13.1 of this Court this Petition is filed within 90 days of the dated of entry of the Order.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) (2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. CONSTITUTIONAL PROVISIONS

The issue raised addresses to right to personal property which is protected under the Fifth Amendment of the United States Constitution.

Statutory Provisions

Rule 60 (b)(6) of the Federal Rule of Civil Procedure provides in pertinent part:

Rule 60. Relief from Judgment or Order

...;

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

...

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

INTRODUCTION

> "A man who has never gone to school may steal from a freight car; but if he has a university education, he may steal the whole railroad."
>
> *Theodore Roosevelt*

1. PTI ESTABLISHES TITLE TO THE PURLOINED SOFTWARE

In August, 1990, all copies of extremely valuable software known as MENTIX, then in the process of final development for use to modernize the billions of lines of application code of the U.S. Government, was stolen by gunmen who were agents of an investor, Robert O'Brien, who owned a company aptly named Runaway Development Group ("RDG").

Two days after the theft, O'Brien through a company known as Expert Objective System Development Corporation ("EOSD") entered into a "teaming agreement" with CACI-Federal, Inc., a subsidiary of defendant CACI International (collectively "CACI") for the purpose of developing a derivative version of the software known as MENTIX-MVS, which would be capable of porting on the IBM and Amdahl mainframe computers of the U.S. Government. During the course of the venture, which called for the delivery of several thousand man-hours of engineering and development time, CACI was given several copies of the software.

It took until 1993 for PTI to confirm its title through subsequent litigation, *Runaway Development Group, S.A., v. Pentagen*, 91 Civ. 5643 (JES) at

the conclusion of which the parties entered into a consent judgment providing that PTI was the exclusive owner of MENTIX and entitled to a constructive trust on all derivative versions of MENTIX consistent with U.S. Copyright law. 17 U.S.C. § 101, et seq. A63-A90.

In the meantime, PTI discovered that CACI had, from 1990 to 1993, marketed at least an AT&T and a 3090 MVS version derivative versions of MENTIX to the U.S. Army Material Command. In June 1993, CACI together with IBM was successful in obtaining a $474,000,000 contract for the modernization of the Department of Defense Sustaining Base Information Services ("SBIS"), based upon CACI's representation that it could use software with characteristics very closely resembling those of MENTIX.

2. CACI'S PRE-EMPTIVE COUNTER-ATTACK

Immediately after confirming its title to the software, PTI sued CACI in New York in August 1993, alleging copyright infringement and conversion, and to obtain the return of its property. In response, in late December, 1993, CACI brought a pre-emptive declaratory judgment action in the Eastern District of Virginia (EDVa), seeking a declaration that the mere ***marketing*** of MENTIX to the Government by CACI did not in and of itself constitute a copyright violation, and alleging that PTI had defamed CACI by suggesting that the SBIS contract had been obtained by offering to use a derivative version of MENTIX.

In June 1994, less than six months after CACI's initiated its pre-emptive action, the EDVa Court granted CACI summary judgment, holding that mere ***marketing*** of MENTIX by CACI did not violate

PTI's exclusive rights under 17 U.S.C. § 106. In so doing, the EDVa Court found that there was no evidence that the purpose of the "teaming agreement" had been realized, i.e., that a derivative work had been made or distributed. Moreover, the Court relied heavily on CACI's expert, who opined that MENTIX was not useful for the SBIS contract because it was not capable of being ported on the Governments 3090 MVS mainframe computers.

3. CACI'S COUNSEL TRANSGRESSES THE LIMITS OF ZEALOUS ADVOCATE

As it later turned out, however, the attorney for CACI, J. William Koegel, of Steptoe and Johnson ("CACI's Counsel") had undertaken a deliberate scheme that included suborning evidence, interfering with opposing counsel's efforts to obtain the truth and had even gone so far as to manufacture the expert's report that was totally false and misleading because the attorney made sure it was based upon an evaluation of the older software stolen in 1990, not the current derivative version of the software developed under the teaming agreement and offered to the Government in 1993. Of course, in order for this fraud to be successful, both CACI and a key Government witness, Edgar Brasseur, in response to discovery requests, had to state or strongly imply falsely under oath that no derivative version of MENTIX existed.

The evidence presented to the Courts below establish that CACI's Counsel not only concealed evidence he was bound to disclose and suborned witnesses he knew would present false evidence, but actually drafted and created the false evidence presented by others.

CACI's counsel's scheme would have gone undetected had the key evidence not been revealed in 2000 by Brasseur in response to Letter of Request issued by an English High Court. Brasseur's deposition left absolutely no doubt that in 1991, the Government had tested MENTIX on a 3090 mainframe computer, and that the software achieved performance levels exactly as CACI had represented to the Government in the Business Case and to obtain the SBIS contract.

4. THE FRUITS OF DECEPTION

However, before this information was revealed, based on the EDVA ruling, CACI moved to dismiss PTI's prior claims in New York. In 1996, Judge Mukasey gave *res judicata* effect to the EDVa factual findings and copyright rulings, although he noted that CACI had inexplicably restricted the EDVa action to the question of infringement by marketing software that CACI later claimed was ineffective and that it did not actually have. Nonetheless, in dealing with the state common law claims, such as conversion to be still decided, he held that in the absence of an "extra element," PTI's conversion claim would be preempted by the copyright ruling.

CACI's counsel does not now make any attempt to deny that CACI developed the derivative version of MENTIX and that the Government successfully tested that version years before the misleading presentations to the EDVa Court, which were then repeated to the New York Court. It is now obvious that as a result of CACI's Counsel's scheme, the courts have been unable to perform their tasks properly. PTI's latest efforts to obtain a turnover order for the return of its property acknowledged under the July

1993 Order was been denied in 2006, because Judge Sprizzo, who signed the initial judgment granting exclusive title to PTI, felt bound by Judge Mukasey's 1996 Decision, even though it relied on factually incorrect evidence.

The net result has been that CACI's counsel, by creating and presenting false evidence, by concealing material evidence it was bound to disclose, and by misusing and manipulating the courts, has interfered with the judicial machinery and the impartial administration of justice, and made the courts virtual accomplices to a fraudulent scheme whereby CACI has been granted *de facto* title to extremely valuable software exclusively owned, or so the 1993 judgment states, by PTI.

STATEMENT OF FACTS

1. Claim Seeks Return Of All Derivative Versions Of Stolen Software Notwithstanding CACI's Counsel's Foul Play.

This action seeks the return of all derivative versions of MENTIX which was capable of modernizing types of software, and, according to CACI at the time, was far superior to any comparable available product.

2. Facts Publicly Known To 2000

A. 1990: CACI obtains stolen MENTIX source code from gunmen

CACI, who had been introduced to the software in March 1990, described it as "mindboggling" (A189) and believed, that if developed for the IBM 3090 mainframe computer, which was then being undertaken, could be marketed to 40,000 used by the U.S. and major companies throughout the world (A138).

In August 1990, the software and the computers on which it was lodged was stolen at gunpoint by agents of an investor, Robert O'Brien, who owned RDG. Two days after the armed robbery, O'Brien through EOSD entered into a "teaming agreement" with CACI for the purpose of finalizing the development of the derivative version of the software, known as MENTIX-MVS, which would be capable of porting on the IBM and Amdahl 3090 mainframe computers of the U.S. Government. (A128)

B. 1990-1993: PTI SUED RDG; 3090 VERSION DEVELOPED/TRANSFERRED TO U.S.

As set out in the evidence attached (A128-147), for about one year, the parties to the Teaming Agreement set out to develop, market and license the 3090 Version of the software.

However, in January 1992, CACI purported to terminate the "teaming agreement" because no contracts had been entered into with AMC (A-144-147). CACI returned a copy of the original, stolen software, and represented that they had returned all proprietary MENTIX in CACI's possession.

Immediately thereafter, CACI entered into a new "teaming agreement" with IBM to bid on a massive $474,000,000 contract to modernize the Defense Department's archival software, know as Sustaining Base Information Systems ("SBIS"). CACI proposed to use its "RENovate" methodology, which included as one of its "tools" software with characteristics similar to MENTIX (A-138-139;224). The IBM/CACI team landed the contract, but because of PTI's strident protests, IBM directed that RENovate not be used on the SBIS contract. (A-182-3) As it turned out,

the IBM/CACI team was unable to deliver, and the contract was terminated half-way through.

C. JULY 1993: RDG ACKNOWLEDGES PTI'S TITLE IN JUDGMENT.

Before trial, the parties in *Runaway Development Group, S.A., v. Pentagen,* 91 Civ. 5643 (SDNY, JES), RDG and PTI, entered into a consent judgment providing that PTI was the exclusive owner of MENTIX and entitled to a constructive trust on all derivative versions of MENTIX, consistent with U.S. Copyright law. 17 U.S.C. § 101, et seq. (A63-A90). Although the MENTIX software contained copyright notices, PTI did not officially register its copyright until December 7, 1993.

D. JULY 1993: PTI SUES CACI FOR CONVERSION IN NEW YORK

In July 1993, PTI initiated this suit against CACI in the New York Supreme Court, which was removed to federal court. PTI's actions which are subject of this appeal, seek *inter alia* damages for conversion, other claims, and the return of all versions of MENTIX.

3. CACI'S COUNSEL'S DEFEATS N.Y. CONVERSION CLAIM BY OBTAINING DECLARATORY JUDGMENT IN EDVA LIMITED TO OUTDATED KNOWN FACTS ONLY.

A. CACI'S COUNSEL'S SCHEME WAS SIMPLE, YET SOPHISTICATED.

CACI's counsel's scheme was to ensure that the evidence of client's conversion remained secret; obtain declaratory judgment in another court on outdated known evidence based on ***marketing*** only; and then use the declaratory judgment to defeat all PTI claims under res judicata or issue preclusion rules.

CACI's counsel knew at least from the time PTI commenced action against CACI after having its title confirmed by Judge Sprizzo in July 1993, that the only hard evidence that PTI had that the AT&T/3090 versions had been developed was the marketing material presented by CACI to AMC in July 1991 "Business Case." [1] (A136-7:190-7) ("Business Case")

All material representations made by CACI's counsel to all the courts until 2000 were based on a false premise that CACI did not have any other version of the software.

So long as neither CACI nor the U.S., (the only two parties that knew that the derivative version existed) never disclosed the fact that the 3090 version had been transferred by CACI and tested by the U.S., CACI could seek a declaration that the only evidence of the existence of the 3090 version, such as the Business Case, was not a breach of PTI's MENTIX copyright.

B. CACI's Counsel deliberately commenced a new proceeding limited to outdated known facts

1) Before filing new action, Counsel checked with Mr. Brasseur as to "communications with PTI"

Before filing its pre-emptive counter-complaint in EDVa on December 22, 1993, CACI's counsel approached Edgar Brasseur ("Mr. Brasseur") who was responsible for evaluating MENTIX for the Army Materiel Command, on December 20, and specifically discussed with him "communications with PTI"

---

[1] Of course, the concealed evidence of the successful test of the derivative version would have led to completely opposite decisions in all litigation.

(A172). We know what Mr. Brasseur said to CACI's counsel because Mr. Brasseur was the very officer who, at the time had failed to respond to a Freedom of Information Act ("FOIA") Request (A180-2) for any information concerning any tests and who thereafter, until 2000, never disclosed the successful testing of the derivative version in at least 2 subsequent false FOIA responses. (A202-5)

Moreover, Mr. Brasseur, who led the project within the U.S. Government, was the U.S. employee who provided at least one misleading Witness Statement to the English High Court in 1996, which CACI's counsel specifically described later as evidence that could "defeat PTI's claims". (A226)

2) CACI then filed for declaratory relief in EDVa

Armed with the knowledge of PTI's "communications" with Mr. Brasseur, two days later, on December 22, 1993, CACI filed a declaratory judgment action in the EDVa (A158-161), claiming the Southern District of New York lacked jurisdiction (A97). In fact, CACI-Federal had been qualified to do business in New York since 1981 (A197-8).

The EDVa action was confined to CACI's ***marketing activities***, while the New York action sought relief for the conversion of the property (A39). CACI asked the EDVa. Court to find that its marketing did not violate PTI's copyright or trademark, nor did RENovate, which it claimed was "tool independent," nor its SBIS activities. CACI's counsel then moved for a stay of the New York action, which was granted, even though vigorously opposed by PTI.

3) EDVa Action termed as "deliberate" limitation of claim by Judge Mukasey.

As Judge Mukasey noted in his Opinion in 1996,

> "... CACI deliberately limited the Virginia action to the infringement claims, and thereby implicitly agreed to litigate separately the other claims that had already been raised by Pentagen." (A39)

Because CACI's Counsel knew that CACI had secretly converted the derivative version of the stolen software, CACI's Counsel's act of commencing the new action to avoid the secret was a misuse of the court procedures, because he knew of the successful test that would have led to an opposite conclusion.

C. CACI'S COUNSEL MADE SPECIFIC MISREPRESENTATIONS THAT NO DERIVATIVE SOFTWARE EXISTS.

1) Discovery was undertaken in EDVa for both actions

Discovery was undertaken in the EDVa action for use in both cases. Even though CACI had already transferred the derivative version of the software, the evidence presented or not presented by CACI's counsel to both the EDVa and NY courts is signifycant. At no time, in answer to any request for documents, or any interrogatories, did CACI ever produce any evidence of the secret test, or any evidence of the 3090 or AT&T Versions.

2) CACI's Counsel's May 6, 1994 Letter

On the other hand, CACI's Counsel made the specific misrepresentations in response to discovery demands. Throughout the limited four-month discovery period set in EDVa, PTI had sought, by discovery demand, a copy of the unidentified software referred to by CACI in its bid for the SBIS contract. CACI never provided any software. Instead of CACI itself responding to discovery, CACI counsel's letter of May 6, 1994, noted that CACI had repeatedly stated that

CACI had no software (which was inconceivable). The lawyer stated categorically "... [having checked with CACI], CACI does not have [software] and, in fact, did not itself license [the software]..." (A169-171). Based on the evidence now known, that statement made by CACI's Counsel was completely false.

3) NY judgment confirms evidence of derivative Version not produced.

As Judge Mukasey specifically noted, later in 1996:

> "...[T]here was no evidence that CACI had distributed a copy of MENTIX, or any derivative material to AMC in the prescribed period. Accordingly, there was missing a fundamental element of a claim of copyright infringement – proof that the work was copied, directly, or by proof of access and substantial similarity." (A29)

Judge Mukasey was referring specifically to Judge Brinkema's comments where she noted:

> "***In rebuttal to plaintiffs' evidence that it did none of those things***, defendants offer only a statement by an AMC employee that he overheard a comment related to MENTIX from which he inferred that a copy of the software had been made by CACI and provided to the AMC. (emphasis added). (A100)

D. CACI'S COUNSEL SUBORNED A FALSE U.S. GOVERNMENT RESPONSE TO PTI'S SUBPOENA

At the same time, PTI sought specific information from the U.S. and others who may have known of any other version of the stolen software. On March 24, 1994, PTI issued and served a subpoena, returnable on April 1, to the DoD in which PTI specifically sought the following:

"All documents relating to the RENovate product described in the SBIS Program or MENTIX product including:

a) any documents relating to the development, operation, presentation and marketing of RENovate or MENTIX either by IBM or CACI or any other person; ...

2. All reports, evaluations, reviews, assessment, and opinion made by or for IBM or CACI or DoD regarding MENTIX, RENovate or any other Software Reuse approach, Reengineering Methodology, Conversion Methodology or the design or development discussion for the SBIS Proposal or described as to developed or performed in the SBIS Work Statement that is patterned on the RENovate process and that can achieve the results claim or otherwise related product referred to in the SBIS Program." (A175-180)

The successful test of the derivative version should have been disclosed in the response to the Subpoena. But, CACI's counsel was right there to assure that it was not; as the time records note:

DATE	HOURS	DESCRIPTION
03/25/94	3.00 hrs	... ; telecon with Colonel O'Brien re subpoena received by ISSAA; review ISSAA subpoena; ...
03/30/94	3.00 hrs	Telecon with Colonel O'Brien re ISSAA response to Pentagen's document subpoena;" (A173)

The 3090 version referred to extensively in the Business Case was not disclosed; CACI's Counsel participated in the preparation of the response, which was incomplete and misleading. The 3090 version that Mr. Brasseur divulged in 2000 was not disclosed, and, on his own evidence, CACI's counsel collaborated with the U.S. in not divulging it.

E. During EDVa Discovery, CACI's counsel took all necessary steps to limit PTI's ability to obtain evidence from the U.S. Government

Because of the failure of the U.S. or CACI to produce any relevant material in response to the discovery demands, and unaware of the existence of the successful test of the derivative version, on April 12, 1994, PTI's counsel reported his suspicions of fraud to the FBI immediately after the U.S. failed to provide any relevant information in response to the March 1994 subpoena. (A164-9).

On the same day, prior to meeting with PTI's counsel, the U.S. informed CACI's Counsel of the phone call from PTI's counsel (A153;164). CACI's Counsel spoke to the Government and wrote a threatening letter to Mr. Robinson (PTI's Counsel) (A164-9).

The FBI wrote a report of the meeting (A164-9) but by May 23, 1994, the FBI had handed its investigation to CACI's counsel's contact in the U.S. Attorney's Office, and no results of the investigation were ever reported to PTI. (A183-5)

F. CACI's Counsel then Manufactured a False Expert Opinion that 3090 version could not be developed.

*1) CACI's Counsel spent more than **fifty hours** on preparation of Expert Opinion*

CACI's Counsel's time records establish that he spent more than ***50 hours*** from March 17 through to May 1994 preparing the Expert's Opinion which later turned out to be false. His activities, as described in his time sheets included various "telecon(s) with Dr. Rotenstreich", "assemble and transmit [material] to ... for review" and "review[ing] list of questions prepared by Dr. Rotenstreich;" (A171-4)

Dr. Rotenstreich gave his "opinion", notwithstanding that the U.S. had previously secretly tested the derivative version in 1991 and the derivative version tested was proven to be able to achieve the vaunted 50 percent reusability rate that was then offered by CACI and IBM to the U.S. in programs such as SBIS. (A224) While CACI's Counsel knew of the successful test, it is not known whether CACI's Counsel informed the expert of this key fact.

As Judge Mukasey noted referring to the EDVa Court:

> "..., the Court addressed CACI's work on the SBIS contract. The Court found that CACI had returned its [*16] copy [sic] of MENTIX before the government began to solicit proposals for the SBIS project, and that there was no evidence that CACI created a product substantially similar to MENTIX, or that MENTIX could fulfill the SBIS specifications. (*Id.* at 10-11). Therefore, the Court concluded, CACI's involvement with the SBIS project did

not and would not infringe Pentagen's MENTIX copyright." (A30)

2) CACI's Counsel controlled what expert was shown: secretly developed 3090 Version of the software was not reviewed.

CACI's Counsel was fully involved with the preparation of the expert opinion which sought to prove that the 3090 version could not be developed.

It is clear from the expert's description of services (A174-6) that CACI's Counsel never delivered a copy of the already developed 3090 version of the stolen software to the expert. Absolutely no mention is made in the expert's description of services or in the Report proffered to the courts of the 3090 version that CACI had previously transferred and which had already reached the results as offered in the SBIS Program.

And CACI's Counsel presented the Expert Opinion to both Judge Brinkema and Judge Mukasey to establish that the 3090 version as offered to in the SBIS Program could not be developed. As the former noted:

> "..., the unrebutted evidence, specifically the report of Dr. Rotenstreich, plaintiffs' expert, reflects that MENTIX (or its derivative) could not perform the reengineering offered by CACI in the SBIS project...." (A101)

3) 2000 evidence establishes that Expert Opinion was wrong; a 3090 version with the same characteristics as offered in SBIS had been secretly tested by the U.S.

As Mr. Brasseur noted in 2000, the version that CACI transferred to the U.S. achieved a 50 percent reuse rate, the very figure that was offered by CACI

and IBM in 1993 to the U.S. under the SBIS Contract. (A221)

G. CACI'S COUNSEL OBTAINED EDVA 1994 DECISION AS PLANNED.

In June, 1994, the EDVa granted CACI's motion for summary judgment. Judge Brinkema identified the central issue.

> " ... the central issue to be decided is whether marketing without actual distribution of a software package constitutes copyright infringement. For the reasons set forth below, we hold that it does not." (A99)

The Court made the following findings:

> "There is no evidence in the record that the derivative work was actually prepared or that MENTIX was copied (within the statutory time frame) or distributed in any respect pursuant to the AMC during CACI's marketing efforts under the teaming agreement." (A99)

♦——♦——♦

> "Apart from the backup copy [sic], there is no direct evidence of copying."(A100)

♦——♦——♦

> "there is still no evidence in the record that CACI created a product that is substantially similar to MENTIX. Moreover, the *unrebutted* evidence, specifically the report of Dr. Rotenstreich, plaintiffs' expert, reflects that MENTIX (or its derivative) could not perform the reengineering offered by CACI in the SBIS project." (emphasis supplied) (*A101*)

H. CACI COUNSEL'S CONTINUED TO THWART PTI'S COUNSEL EFFORTS TO UNCOVER EVIDENCE.

The EDVa Decision only addressed CACI's ***marketing*** efforts, and PTI made further efforts to obtain evidence from the U.S. and others as to the stolen software for use in this New York conversion action. PTI's efforts were all unsuccessful.

In 1998, it was discovered (obtained in a PTI FOIA action), that CACI's Counsel and the U.S. Attorney for the SDNY had, from 1994, exchanged numerous documents (about 2000 pages worth) related to this dispute[2]. In addition, the Government and CACI's counsel had conferences with each other to discuss strategy[3].

In June 1995, prior to Judge Mukasey's Decision in June 1996, the Assistant U.S. Attorney prohibited PTI's counsel from undertaking any further investigation for evidence with the Government other than through him (A186-9).

"... Please be advised that because there is

---

[2] In 1998, using enforcement proceeding under FOIA, in *Pentagen Technologies Int'l Ltd v. United States*, reported in the N.Y Law Journal, June 16, 1999, p.25.

[3] See e.g. Magistrate Judge Katz in *Pentagen Technologies Int'l Ltd v. United States*, June 16, 1999. (supra) "... Each of the three pages produced consists of handwritten notes of Assistant United States Attorney Koenigsberg, reflecting in an extremely abbreviated fashion the identities of people with whom he communicated [in 1995].... The government concedes that it communicated with [CACI], and it has provided its actual communications with them...."

What neither Judge Katz nor PTI knew at the time of Magistrate Judge's determination (in 1999) was that, contrary to all of CACI's representations on the subject, CACI and the U.S. knew that CACI had transferred the 3090 Version of the software, the very basis of all the litigation between PTI and CACI.

> pending a litigation that you have initiated, all communications with any Government employee concerning the lawsuit should be conducted through the undersigned, the attorney for the Government assigned to represent the Government with respect to the above-captioned action." (A186)

Because the U.S. failed to acknowledge its secret use of the 3090 version of the stolen software, this prohibition effectively made it impossible to obtain any further evidence on the subject. Nevertheless, PTI undertook further enquiries through the Congress and otherwise in its efforts to interview key Government and non-U.S. witnesses who could have shed light in the facts that were later established through the English High Court. (A154)

I. CACI's Counsel Then Obtained Judge Mukasey's July 1996 Order Using Res Judicata.

Because PTI was unable to obtain any further evidence either from CACI or the U.S., it could offer no further evidence in the New York action. In 1996, (the three SDNY actions were effectively consolidated) Judge Mukasey granted CACI's motions to dismiss, relying heavily on the findings of the EDVa decision.

> "Pentagen's federal claims of copyright infringement asserted here clearly arise from the same series of transactions that were at issue in the Virginia action ... The facts on which those claims are based – CACI's marketing efforts with AMC – and the efforts necessary to prove those facts, are identical to those considered by Judge Brinkema. Accordingly, I am presented here with a paradigm of the situation that res judicata is intended to

avert and resolve." (A37)

However, Judge Mukasey noted that CACI had fashioned its claim in EDVa to avoid some of the claims in the SDNY actions.

> "Although it appears that Pentagen's additional claims do arise from the same transaction as do those decided by the Virginia court, appears also that CACI deliberately limited the Virginia action to the infringement claims, and thereby implicitly agreed to litigate separately the other claims that had already been raised by Pentagen. CACI could have sought declarations on the other claims against it by Pentagen, but for whatever reason chose not to."(A39)

Consequently, PTI's conversion claims remained to be decided under State law. However, evidence was lacking of anything beyond marketing (since CACI had refused to provide it), and Judge Mukasey held that PTI's conversion claims lacked the "extra element" that would take them beyond trademark infringement.

> "A state law claim is not preempted if it includes an "extra element" that renders it qualitatively different from a claim of copyright infringement (citations omitted) ... Here, Pentagen's claim for conversion is qualitatively equivalent to its claim for copyright infringement because that claim arises from the improper and unauthorized use of Pentagen's intellectual property, a copyrighted work. Pentagen's conversion claim includes no "extra element" that would withdraw it from the reach of federal preemption."

(A45-6)

4. USING MUKASEY DECISION, CACI'S COUNSEL DEFEATS PTI IN OTHER ACTIONS USING ISSUE ESTOPPEL.

A. USED ISSUE PRECLUSION, KNOWING THE DECISIONS WERE BASED ON INCORRECT FACTS

There followed a series of False Claims Act proceedings, in which CACI relied on issue preclusion to dismiss the action. In each case, CACI's efforts were successful. PTI's litigation efforts (see e.g. A7-8), were all denied in one way or another by referring to the tainted ruling.

B. CACI'S COUNSEL THEN ASSISTED IN OBTAINING MISLEADING 1996 BRASSEUR WITNESS STATEMENT.

After Judge Mukasey's decision, CACI's Counsel became involved with English legal counsel in a related law suit proceeding in the English High Court.

As noted in subsequent proceedings:

> "During discovery in the U.K. Action, [English solicitors] (as the attorneys for the Jordan Companies) met with J. William Koegel, Jr of Steptoe & Johnson (as the attorneys for CACI) [in 1996]. As a result of these meetings, it was determined that E.F. Brasseur, an employee of the AMC, had information which would defeat Pentagen's damages claim in the U.K. Action. Mr. Brasseur, after consulting with his attorney, signed a witness statement to be introduced into the U.K. Action (the "Witness Statement"). ... (A226)

The witness statement made reference to a test of MENTIX that had never been disclosed before. Upon receipt of the Witness Statement in early 1997(A198),

PTI sought information thereon, under FOIA, from Mr. Brasseur, who failed once again to produce any information of the successful test. (A202-5)

PTI's counsel then raised the issue with CACI's Counsel, who strenuously denied that there had been such a "technical evaluation" and even accused PTI's counsel of attempting to perpetrate a fraud by claiming that such a test must have occurred. (A205-214).

To address the confusion caused by the reference to the previously undisclosed test, on PTI's motion, the English High Court ordered a Letter of Request to Mr. Brasseur, in the U.S., and PTI's counsel cross-examined Mr. Brasseur on the subject. (A214-5)

C. Secret test Revealed; 2000 Brasseur Cross Examination establishes CACI's Counsel subterfuge.

At his deposition, which occurred on April 12, 2000, Brasseur stated the following about the 3090 MVS test:

> "A. Well, what I can tell you was MENTIX had to be able to port to our 3090 [to run the test]. The 3090 was the AMDAHL mainframe that our software was running on, so obviously MENTIX had to run on the 3090 to convert that COBOL code to ADA code." (p. 31)[parenthetical material and emphasis supplied]

◆——◆——◆

> "A. The content [of the test report] said, Hey, this stuff, yeah, we ran it ; yeah, it did convert about 50 percent of the code..." (p. 38)

◆——◆——◆

> "A. There are two evaluations. There's the

AVION and there's the AMDAHL 3090." (p. 41)

♦——♦——♦

"A. The 3090 was the first evaluation, and SIMA [in Chambersburg, PA] did the 3090 evaluation. I have no idea who did the AVION." (p. 59)

♦——♦——♦

"A. That's right. My opinion is that MENTIX was tested one time on an IBM 3090, all right. (A221)

D. BRASSEUR 2000 EVIDENCE UNDISPUTED.

Neither the Government nor CACI has made any attempt to refute the evidence of the 3090 MVS derivative version, and the successful testing of that version by the Government.

5. PTI'S EFFORTS AFTER 2000 TO UNRAVEL MANIFEST INJUSTICE

A. PTI PRESENTED NEW EVIDENCE TO COURTS WITHOUT SUCCESS.

Upon receipt of the Brasseur Evidence, PTI immediately tried to rectify the injustice that CACI's Counsel had caused.

PTI attempted to insert this new evidence into the pleadings in three SDNY actions, two under the False Claims Act and one under the Tort Claims Act. Judge Sprizzo found that the new evidence did not make the federal claims any more cognizable under the False Claims Act, and declined to entertain pendent jurisdiction over any state law claims. 103 F. Supp.2d 232, 237-8. Judge Batts then found a new False Claims suit to be a repetition of the one previously rejected by Judge Sprizzo. 2001 WL 770940.

Judge Stein found that he lacked subject matter jurisdiction of a Tort Claims suit against the Government, and added as additional grounds statute of limitations and res judicata, based upon Judge Mukasey's decision. 2002 WL 465308.

B. PTI PRESENTED RULE 60(B)(6) TO EDVA WHO RULES EVIDENCE ONLY "INFERENCE" AS TO CACI.

PTI then moved under Rule 60(b)(6) in the EDVa, which denied it because three prior courts had found that the new evidence did not make otherwise invalid claims cognizable. (A108-127)

The Court termed "inference" any reasoning that would result in a different outcome in the earlier proceeding. In other words, even if the Government did test an MVS version of MENTIX, that did not necessarily implicate CACI or the result below. (A116-7)

In any event, PTI did not require a reversal of the relevant portions of the judgment issued in EDVa, which was based on the marketing efforts of CACI. PTI was seeking the return of the derivative software, the evidence of which CACI's Counsel had deliberately excluded from the EDVa courts.

C. PTI OBTAINS FURTHER EVIDENCE PROVING THAT CACI HAD TRANSFERRED THE 3090 VERSION OF MENTIX TO THE U.S.

Convinced that MENTIX MVS and the AT&T version were still somewhere to be found, PTI sought leave proceed in accordance with the 1993 judgment (A63-75) awarding it exclusive ownership of MENTIX and its derivatives. With the Court's leave, PTI conducted discovery of O'Brien and his associates, as well as three former Government employees.

O'Brien confirmed that he had given the MENTIX source code only to CACI, and so the version tested

by the Government in its 3090 computers could only have come from CACI (A221-4). Two of the Government employees, who worked at the Chambersburg test facility, confirmed the likelihood of the test described by Mr. Brasseur, but thought unlikely the absence of any records.

D. PTI's Counsel sanctioned and prohibited from further appearance; Independent Counsel appointed

CACI's Counsel then moved to have PTI's Counsel sanctioned by the court, even though the 2000 Brasseur evidence established that CACI and its counsel had misused the court system. As a consequence, PTI's counsel was prohibited from any appearance in the action for the recovery of the assets. (A158)

PTI appointed an Independent Counsel.

E. Turnover proceedings

Since the Government and/or CACI at one time had MENTIX-MVS, and neither of them had accounted for it, PTI sequentially sought leave to bring turnover proceedings to bring about such an accounting. In both instances, (A75-90) leave was denied because, the Court reasoned, if PTI had not established the right to bring a conversion claim against CACI, which had received MENTIX from O'Brien and transferred in a derivative form to the Government, then PTI's clouded title did not entitle it to turnover relief. In other words, Judge Mukasey's decision stood in the way of PTI's proceeding further. see (A83-4;87-8)

Finding itself stymied by Judge Mukasey's decision, PTI then moved for relief under Rule 60(b)(6).

F. DISTRICT COURT RULING IN RULE 60(B)(6):

PTI's Motion for relief under the 1996 decision pursuant to Rule 60(b)(6) was denied. Judge Mukasey had retired and the motion was assigned by Judge Lynch. (A6-17). In denying the motion, Judge Lynch held: (1) the motion was untimely; (2) Judge Mukasey did not rely on the representations that no derivative version of MENTIX had been created; and (3) if the holding in EDVa. – that mere marketing was not a copyright violation – is irrelevant, that argument could have been made to Judge Mukasey.

G. COURT OF APPEALS RULING IN RULE 60(B)(6).

PTI appealed. The Court of Appeals ruled (A1-6) that Pentagen had not pointed to any specific instance of misrepresentation by CACI's counsel no derivative version of MENTIX had been created. The Appeals court in its ruling made no reference to the fact that, in 1994, the EDVa Court had specifically ruled that CACI and its counsel had assured the EDVa court that it had not prepared or copied MENTIX, that it had presented an expert's report (Dr. Rotenstreich) that neither MENTIX nor a derivative could perform the re-engineering that had been offered by CACI, and that the U.S. responses to FOIA Requests and a Subpoena had failed to disclose any use by the Government.

Rather, the Appeals court ruled that CACI is, at most, guilty of not disclosing material information during discovery, and held that such failure to disclose material during pretrial discovery is not fraud on the court. The Appeals court also held that a lawyer does not commit fraud on the court by arguing for summary judgment on grounds that the record does not contain certain evidence, even if it is later discov-

ered that the evidence existed but was not in the record.

But the court went further. The court ruled that even if Pentagen were able to demonstrate that CACI perpetrated a fraud on a court, the defrauded court was the EDVa. court, not New York. Effectively, the two courts pointed to each other, ignoring that both had been misled by CACI and its counsel. The Appeals court also ignored Pentagen's contention that the EDVa court decision was no longer relevant because it only addressed ***marketing*** issues and not ***use***.

Pentagen now moves for this court to issue Certiorari.

REASONS FOR GRANTING THE WRIT

1. THE ORDER IS A FINAL ORDER FOR THE PURPOSES OF 28 U.S.C. § 1291

For the reasons set forth above, the Order made by the Courts below is a final order.

2. THE COURT SHOULD UPDATE AND CLARIFY *HAZEL-ATLAS*.

Although it is well established that mere witness perjury or nondisclosure, by itself, does not amount to fraud on the court, what is less clear is where the line should be drawn, beyond which an attorney's active or complicit conduct becomes unacceptable. It is submitted here that where subornation of all of the witnesses possessing relevant evidence, is combined with the other evidence presented such as the creation of a misleading expert report based upon evidence known to be false, that line, properly drawn, has been crossed.

A. THE CIRCUIT COURT SHOULD HAVE GRANTED RELIEF UNDER RULE 60(B)(6).

The Standard For a 60(b)(6) Motion.

It is undisputed that mere perjury, non-disclosure or fraud on a party are insufficient for relief under Rule 60(b)(6). As stated in the oft cited Moore's Federal Practice 3d,

> "Fraud on the court must involve more than injury to a single litigant; it is limited to fraud that 'seriously' affects the integrity of the normal process of adjudication. Fraud on the court is limited to fraud that does, or at least attempts to, 'defile the court itself' or that is perpetrated by officers of the court 'so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases." § 60.21[4][a]

The classic case that illustrates this type of required conduct is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944), where an attorney was involved in the preparation of a false scientific report which was published in a magazine and then used as evidence in a subsequent case.

The analog in this case of the fraudulent magazine article in *Hazel-Atlas* is the fraudulent expert report, where CACI's expert was given an older version of MENTIX in order to induce him to opine that it was impossible to do what CACI and its counsel knew had already been done.

B. Variance Between Circuits As To Definition Of "Fraud On The Court"

1) Variance of Circuits

While the Supreme Court has never provided a definition of the standard required in such cases, various circuit courts have. The position in the circuits has been summarized in *Herring v. U.S.* 424 F.3d 384 (3rd Cir.2005) *cert den*, 547 U. S. 1123 (2006) as follows:

> "In order to meet the necessarily demanding standard for proof of fraud upon the court we conclude that there must be: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court.[FN1]
>
> [FN1]The United States Court of Appeals for the Sixth Circuit has set forth five elements of fraud upon the court which consist of conduct: 1. On the part of an officer of the court; 2. That is directed to the judicial machinery itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir.1993).
>
> We further conclude that a determination of fraud on the court *387 may be justified only by the most egregious misconduct directed to the court itself, and that it must be supported by clear, unequivocal and convincing evidence. *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust*

Actions, 538 F.2d 180, 195 (8th Cir.1976) (citations omitted).

Although other United States Courts of Appeals have not articulated express elements of fraud upon the court as the Sixth Circuit did, the doctrine has been characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense. *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir.1976) (citations omitted); see also *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir.1978) (holding only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court). Additionally, fraud upon the court differs from fraud on an adverse party in that it is limited to fraud which seriously affects the integrity of the normal process of adjudication. *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988).

Other United States Courts of Appeals expressly require that fraud upon the court must involve an officer of the court. *See Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 48 (1st Cir.1995); *Demjanjuk*, 10 F.3d at 348. The Ninth Circuit noted that one species of fraud upon the court occurs when an officer of the court perpetrates fraud affecting the ability of the

> court or jury to impartially judge a case. *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1130 (9th Cir.1995); *see also Weese v. Schukman*, 98 F.3d 542, 553 (10th Cir.1996) (noting that fraud on the court should embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court) (citation omitted); *Kerwit Med. Prods., Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (11th Cir.1980) (same).

Using any of the standards expressed by any of the circuits, it is submitted that in this case, CACI's Counsel has committed a fraud on the court.

2) Second Circuit's Opinion in the case at bar.

The Second Circuit made no reference to the facts set forth above. Rather the court stated that it was "doubtful" that the facts set forth amounted to a fraud on the court.

3. KEY INGREDIENT OF "FRAUD ON THE COURT" IS THAT "JUDICIAL MACHINERY CANNOT PERFORM IN THE USUAL MANNER ITS IMPARTIAL TASK OF ADJUDGING CASES" BY REASON OF CONDUCT OF COUNSEL.

A. LAW

Referring to *Gleason v. Jandrucko* supra, the Second Circuit in this case stated that CACI was at the most guilty of not disclosing material information during discovery, which it had held, was not a fraud on the court. In effect, the court was drawing a distinction between *Gleason*, where perjury had been committed by police officers, and cases such as *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 (2d

Cir. 1985), where the Court applied fraud on the court principles to grant relief where a garnishee had not disclosed that it held assets of a judgment debtor. The distinction between the two cases seems to be that perjury by a witness is insufficient for a fraud on the court, but that knowing false information proferred by an attorney will be.

It is submitted that the standard set by this court in *Hazel-Atlas* has to do with for example an attorney who has misused the levers of the court system resulting in the inability of the court system to function properly, rather than perjury. As the court stated in *Gleason*,

> "In short, neither perjury nor nondisclosure, *by itself*, amounts to anything more than fraud involving injury to a single litigant. *Cf. Hazel-Atlas*, 322 U.S. at 246, 64 S.Ct. at 1001; *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir.1982) ("[p]erjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible"), *cert. denied*, 459 U.S. 1128 , 103 S.Ct. 764, 74 L.Ed.2d 978 (1983)." (italics supplied)

The Second Circuit ruled that the case at bar was similar to *Gleason*, in that all that was missing here was the evidence that CACI had converted the property, and that the evidence was concealed from the court.

However, it is submitted that the evidence presented to that court, and repeated herein, but not set forth in the Appeals Order, is that CACI's Counsel

undertook a series of acts that went far beyond the mere withholding of evidence, and the fact that the fraud resulted in "the judicial machinery [being unable to] perform in the usual manner its impartial task of adjudging cases"

CACI's Counsel's conduct as described herein amounts to tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

> ... The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Id* at 246

B. CACI's Counsel's offending conduct made it impossible for the machinery of justice to perform properly

This is not a simple case of perjury or non-disclosure of evidence. Based on the proven evidence presented in this case, and as referred to in detail above (pp.7-26), PTI had no way to expose the evidence sought in EDVa or the SDNY cases, or to establish the truth using the normal litigation means.

CACI's Counsel's offending conduct can be summarized as follows:

a. limiting discovery to *marketing* issues only by commencing a new action in EDVa;

b. taking steps to ensure PTI could not obtain the evidence from the U.S. in any action;

c. ensuring that when PTI sought the evidence from the U.S. by subpoena, PTI was unable to obtain the results of the test;

d. ensuring that when PTI's counsel made a complaint to the F.B.I. no effort would be made to pursue the investigation;

e. ensuring that any discussions with any of the members of the Government would be restricted by obtaining a U.S. "gag" order against communications with PTI's counsel;

f. creating an expert's report that was incorrect and which contained a conclusion that was directly opposite to what was known to exist. The 3090 version had already been transferred to the U.S. and it had the same characteristics as CACI offered SBIS;

g. using the judgment founded on the false evidence at every subsequent opportunity to defeat every effort made by PTI to obtain its property.

CACI's counsel has subverted of the integrity of the court itself.

4. OTHER CASES SUPPORTING PTI'S INTERPRETATION.

In *Kupferman v. Consolidated Res. & Mfg. Corp.*, 459 F.2d 1072 (2d. Cir. 1972), the Court held that the failure of counsel to disclose the existence of a release that would have been a complete defense to the claim would have been "fraud on the court" in other circumstances. Both parties were insolvent entities, and each had changes of counsel, so that the non-disclosing counsel may have been unaware of the ignorance of opposing counsel of the existence of the release.

CACI's counsel was fully aware that PTI's counsel did not know of the MVS derivative version of MENTIX. Like the undisclosed release, the undisclosed version of MENTIX would have been a complete defense in the EDVa action, and the "extra element" that Judge Mukasey was looking for.

In *Trehan v. Von Tarkanyi*, 63 B.R. 1001 (SDNY 1986), confirmed that there is no inherent time limit on a court's inherent power to overturn a judgment for fraud on the court. A void judgment does not become less void with the passage of time. Citing *Hazel-Atlas*, Judge Pollack wrote:

> "An attorney is an officer of the court and owes the court fiduciary duties and loyalty. When an attorney misrepresents or omits material facts to the court, or acts on a client's perjury or distortion of evidence, his conduct may constitute fraud on the court." *Id* at 1011.

See also Bulloch v. United States, 95 F.R.D. 123 (D. Utah 1982)(finding fraud on the court where the Government and its attorneys made false and deceptive representations, withheld information, and pressured witnesses not to testify).

5. PTI'S EVIDENCE WOULD CHANGE OUTCOME OF THE SDNY OPINION.

PTI's evidence would provide the "extra element" required by Judge Mukasey to establish it claims of conversion.

Judge Mukasey gave *res judicata* effect to the EDVa findings, which were based on the representations by CACI's counsel that no derivative version was prepared, and the opinion of CACI's expert that

a version of MENTIX that ported to the Government's 3090 mainframes was impossible.

6. Unnecessary To Open Judgment in EDVa.

The specific holding in the EDVa is that the mere marketing of MENTIX by CACI was not a copyright infringement. PTI does not quarrel with the principle. It simply wants its software accounted for and returned.

The SDNY action, which would have dealt with the issues of conversion of the software if it had not been given *res judicata* effect to the findings in the EDVa, would be adequate to adjudicate PTI's exclusive rights to its software.

7. A gross miscarriage of justice has been committed; CACI's Counsel's misconduct should not be condoned; all derivative version of PTI's software should be returned.

Simply stated, because of the perversion of justice engineered by CACI's Counsel and the ensuing manipulation of the courts that only became apparent after the year 2000, the prior decisions made in this case referred to above should be reversed, so as to enable the return of all derivative versions of the software.

CONCLUSION

For the reasons presented, this Court should grant the Petition sought.

Respectfully submitted

September 16, 2008

Ambrose M. Richardson, III
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Independent Counsel for Petitioners

APPENDIX A
NEW YORK CONVERSION ACTION V. CACI

1. "FRAUD ON THE COURT" MOTION

a. Court of Appeals for the Second Circuit Order Dated June 18, 2008

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER) UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2. USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of June, two thousand eight.

PRESENT:

HON. JOSEPH N. MCLAUGHLIN,

HON. ROBERT D. SACK,
HON. DEBRA ANN LIVINGSTON,
CIRCUIT JUDGES.

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,

Plaintiff-Appellant,

Nos. 07–1576–cv(L)
07–1581–cv(CON)
07–1582–cv(CON)

CACI INTERNATIONAL, INC., CACI SYSTEMS INTEGRATION, INC., CACI, INC.-FEDERAL, AND J.P. LONDON,

Defendants-Appellees,

THOMAS M. MARSHALL,

Defendant.

Appearing for Appellant: Ambrose M. Richardson III, New York, NY.

Appearing for Appellees: J. William Koegel, Jr., Steptoe & Johnson LLP, Washington, DC.

Appeal from an order of the United States District Court for the Southern District of New York (Gerard E. Lynch, Judge)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the order and judgment of the district court be, and hereby is, AFFIRMED.

Plaintiff Pentagen Technologies International Limited ("Pentagen") appeals from a 2007 opinion and order of the district court denying Pentagen's motion, pursuant to Rule 60(b) (6) of the Federal Rules of Civil Procedure, for relief from final judgments entered in 1996. This is but the latest in a series of lawsuits, motions, and appeals initiated by

Pentagen against defendants CACI International, Inc. and associated entities ("CACI")

We assume the parties' familiarity with the underlying facts and procedural history of this and related cases, and with the issues raised on appeal. This litigation arises from Pentagen's contention that its software program, known as Mentix, was unlawfully appropriated by CACI and developed for use by the United States Government. The district court remarked: "The sorry history of this litigation would take far more space to detail than it is worth." *Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.*, No. 93 Civ. 8512, 2007 WL 586636 at *1, 2007 U.S. Dist. LEXIS 13042 at *1(S.D.N.Y. Feb. 23, 2007). We are in sympathy with the district court's observation.

The cases now on appeal were filed in 1993 and 1994 and consolidated. In 1996, the district court granted CACI's motion to dismiss for failure to state a claim. In that decision, the district court held that several claims advanced by Pentagen were precluded, as res judicata, by a 1994 judgment of the United States District Court for the Eastern District of Virginia. In 2000, Pentagen became aware of new evidence it says is material to its claims: the deposition testimony of a witness that allegedly undermines the basis for the Virginia district court's 1994 judgment. In 2002, Pentagen returned to district court in Virginia and filed a Rule 60(b) motion, asserting that CACI had committed a fraud upon the court by concealing the facts uncovered in the 2000 deposition. The district court in Virginia denied the motion and imposed sanctions. On November 17, 2006, [*2] Pentagen returned to the Southern District of New York and filed a motion to vacate the 1996 judgments pursuant to Rule 60(b) (6), restating its claim that

CACI had committed a fraud upon the court. The district court denied the motion, and Pentagen appeals.

The district court did not abuse its discretion in denying Pentagen's Rule 60(b) motion.

First, it is doubtful that there was fraud on the court. In the action in the Eastern District of Virginia, the district court granted summary judgment to CACI because there was no evidence in the record that CACI had actually copied or developed a derivative version of Mentix. Pentagen now claims that the 2000 deposition testimony proves that finding false. Because the Virginia action was decided on summary judgment, CACI is at most guilty of not disclosing material information during discovery. But failure to disclose material during pretrial discovery is not fraud on the court. *Gleason v. Jandrucko*, 860 F.2d 556, 559-60 (2d Cir. 1988)

Pentagen also argues in this regard that "[t]hroughout both the EDVA and SDNY actions, CACI's counsel represented to the courts that no derivative version of MENTIX had been created." Appellant's Br. at 3. Although an attorney's deliberate misrepresentations to the court may qualify as fraud on the court, *see Demianjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993), *cert. denied*, 513 U.S. 914 (1994), Pentagen does not point to any specific instance of such misrepresentation by CACI's counsel. A lawyer does not commit fraud on the court by arguing for summary judgment on grounds that the record does not contain certain evidence, even if it is later discovered that the evidence existed but was not in the record. *See Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1081 n.9 (2d Cir. 1972)

Second, even if Pentagen were able to demonstrate that CACI perpetrated a fraud on a court, the defrauded court was the Eastern District of Virginia, not the Southern District of New York. The district court in New York rendered judgment in 1996 based on the insufficiency of Pentagen's complaint and based on the res judicata effect of the Virginia district court's judgment. It is well-established that Rule 60(b) motions must be filed in the same court that rendered the judgment the movant seeks vacated. *See* 12 James William Moore, *Moore's Federal Practice* § 60.60[1] (3d ed. 2008); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 350 (2d ed. 1995) . To [*3] counteract the preclusive effect of a judgment, the injured party must seek relief in the court that rendered it.

Pentagen might have a more sympathetic claim if Rule 60 (b) relief were somehow unavailable in the court that rendered judgment in the action where the fraud allegedly occurred. But here, Pentagen did claim "fraud on the court" in the Eastern District of Virginia, and its Rule 60(b) motion there was considered and denied. Accordingly, just as res judicata barred Pentagen from relitigating its underlying claims against CACI in New York after judgment had been rendered in Virginia, Pentagen is now precluded from relitigating the same "fraud on the court" claim in a second forum. *See Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995); *M.W. Zack Metal Co. v. Int'l Navigation Corp. of Monrovia*, 675 F.2d 525, 529 (2d Cir.), *cert. denied*, 459 U.S. 1037 (1982)

For the foregoing reasons, the order and judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of the Court

By: _____

b. S.D.N.Y Order of Judge Gerald E. Lynch dated February 23, 2007.

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,
Plaintiff,

–against–93 Civ. 8512 (GEL)

CACI INTERNATIONAL INC., ET AL,
Defendants.

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,
Plaintiff,

Plaintiff,

94 Civ. 0441 (GEL)

–against–

OPINION AND ORDER

CACI INTERNATIONAL INC., ET AL,
Defendants.

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,
Plaintiff,

94 Civ. 8164 (GEL)

–against–

J.P. LONDON,
Defendant.

Ambrose M. Richardson III, New York, New York, *for plaintiff*

Amy Lester, Steptoe & Johnson LLP, New York, New York, *for defendants.*

GERARD E, LYNCH, District Judge:

Plaintiff Pentagen Technologies International Limited ("Pentagen") moves pursuant to Fed. R. Civ. P. 60(b)(6) to vacate final judgments entered by this Court (Hon. Michael B. Mukasey, United States District Judge) in 1996. The motion will be denied.

BACKGROUND

The sorry history of this litigation would take far more space to detail than it is worth. Suffice to say that Pentagen, the owner of a software program called "Mentix," has pursued claims against defendant CACI International Inc. and related individuals and entities (collectively, ."CACI"), and against the United States Government, for conversion, fraud, false claims, RICO violations, copyright infringement or other violations in at least ten separate actions in three United States District Courts,[4] the Court of

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[4] *Pentagen Technologies Int'l Ltd. v. United States*, No. 01 Civ. 3078 (SHS) (S.D.N.Y.) (alleging conversion and breach of constructive trust under Federal Tort Claims Act); *United States ex rel. Pentagen Technologies Int'l Ltd. v. United States*, No. 00 Civ. 6167 (DAB) (S.D.N.Y.) (alleging misconduct under False Claims Act); *Pentagen Technologies Int'l, Ltd. v. United States*, No. 98 Civ. 1090 (JES) (S.D.N.Y.) (alleging litigation misconduct in violation of False Claims Act); *United States ex rel. Pentagen v. CACI, Int'l Inc.*, No. 96 Civ. 7827 (RWS) (S.D.N.Y.) (reasserting that CACI had filed false claims with the United States) (dismissed by 1997 WL 473549 (S.D.N.Y. August 18, 1997)); *Pentagen Technologies Int'l, Ltd. v. J. P. London*, No. 94 Civ. 8164 (MBM) (S.D.N.Y.) (alleging violations of state law by fraud, negligence, breach of fiduciary duty); *Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.*, No. 94 Civ. 0441 (MBM) (S.D.N.Y.) (alleging inter alia unauthorized use of copyrighted material, wanton and willful infringement of trademark and copyright, false claims against the United States, conversion, violations of New York and Virginia criminal statutes); *United States ex rel. Pentagen v. CACI, Int'l, Inc.*, No. 94. Civ. 2925 (PLC) (S.D.N.Y.) (alleging that CACI had filed false claims with

Federal Claims,[5] and on appeal to three different circuits.[6] It has achieved no success, though it has accumulated characterizations of its arguments as "frivolous"[7] or "ridiculous,"[8] sanctions for abusive liti-

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the United States); *Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.*, No. 93 Civ. 8512 (MBM) (S.D.N.Y.) (alleging same federal claims as in 94 Civ. 0441); *see also CACI Int'l Inc. v. Pentagen Technologies Int'l, Ltd.*, No. 93-163 1-A (E.D. Va.) (seeking declaratory judgment of CACI's nonliability for copyright and trademark violations and judgment of Pentagen's liability and damages for breach of contract, tortious interference, and defamation); *see also Pentagen Technologies Int'l, Ltd. v. Comm. on Appropriations*, No. 98 Civ. 0047 (GK) (D.D.C.) (seeking to compel production of congressional investigations reports purportedly relevant to plaintiffs Mentix-related claims).

[5] *Pentagen Technologies Int'l, Ltd. v. United States*, No. 97-245 (Fed. Cl.).

[6] *Pentagen Technologies Int'l, Ltd. v. United States*, 63 Fed. Appx. 548, 2003 WL 1977386 (2d Cir. 2003) (affirming order of sanctions and injunction from further litigation in No. 98 Civ. 1090 (JES) (S.D.N.Y); *United States ex rel. Pentagen v. CACI, Int'l, Inc.*, 172 F.3d 39 (table), No. 97-6326, 1999 WL 55259 (2d Cir. 1999) (affirming dismissal of No. 96 Civ. 7827 (RWS) (S.D.N.Y.); *Pentagen Technologies Int'l, Ltd. v. Comm. on Appropriations*, 194 F.3d 174 (table), No. 98-5533, 1999 WL 515477 (D.C. Cir. 1999) (affirming dismissal of No. 98 Civ. 47 (GK) (D.D.C.)); *Pentagen Technologies Int'l, Ltd. v. United States*, 175 F.3d 1003 (Fed. Cir.1999) (affirming dismissal of No. 97-245 (Fed. Cl.)); *CACI Int'l, Inc. v. Pentagen Technologies Int'l, Ltd.*, 70 F.3d 111 (table), Nos. 94-2058, 94-2220, 1995 WL 679952 (4th Cir. 1995) (affirming E.D. Va. rulings in all respects).

[7] *Pentagen Technologies Int'l, Ltd. v. United States*, 172 F. Supp. 2d 464, 473 (S.D.N.Y. 2001).

[8] *United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Intern., Inc.*, No. 94 Civ. 2925 (RLC), 1996 WL 11299, *1.6 (S.D.N.Y. Jan. 4, 1996)

gation tactics,[9] and injunctions prohibiting it and its former counsel from filing any more cases.[10]

Pentagen's claims, [*3] in the instant actions and in most of the other cases discussed, derive from its contention that CACI and the Government developed a derivative version of Mentix.

Most of these repeated litigations can be ignored for present purposes. The judgments in the present case dismissed three consolidated actions brought by Pentagen against CACI based on a characteristically thorough and carefully-reasoned opinion by Judge Mukasey. *Pentagen Technologies Int'l, Ltd. v. CACI Int'l Inc.*, No, 93 Civ. 8512 (MBM), 1996 WL 435157 (S.D.N.Y. Aug. 2, 1996). Judge Mukasey reached the following conclusions:

1. Pentagen's federal claims of copyright and trademark infringement were precluded by a final judgment of the United States District Court for the Eastern District of Virginia. *CACI Int'l Inc. v. Pentagen Technologies, Ltd.*, No. CV-93-1631-A, 1994 WL 1752376 (ED. Va. June 16, 1994) (Hon. Leonie M. Brinkema, J.) 1996 WL 435157 at *9. This preclusion extended to Pentagen's claims against Jack London, CACI's then-president, al-

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[9] *Pentagen Technologies Int'l, Ltd. v. United States*, 63 Fed. Appx. 548, No. 02-6061, 2003 WL 1977386 (2d Cir. 2003) (affirming order of sanctions and recommending expansion of injunction from litigation); *In re Joel Z. Robinson*, 99 F.3d 1131 (table), No. 95-2506, 1996 WL 597829(4th Cir. 1996) (affirming order of sanctions); Pentagen Technologies, 172 F. Supp. 2d at 473-74.

[10] *CACI Int'l, Inc. v. Pentagen Technologies Int'l, Ltd.*, No. 93-1631-A (Hon. James C. Cacheris, J.) (E.D. Va. Apr. 10, 2002) (unpublished and unavailable in electronic databases); *Pentagen Technologies*, 172 F. Supp. 2d at 474.

though London was not a party to the Virginia action, because he was in privity with CACI. *Id.* at *17.

2. Pentagen's claim that CACI had violated the Major Fraud Act, 18 U.S.C. § 1031, was precluded because Congress had not authorized a private right of action under that statute. *Id.* at *11 – *12. Its claims that CACI had violated various provisions of the New York Penal Law were dismissed for similar reasons. *Id.* at *15 – *16. Its claims that CACI had violated Virginia's criminal law were dismissed because they were based on "fictitious" or "phantom" provisions of the Virginia Criminal Code that did not actually exist. *Id.* at *16.
3. Pentagen's claim for conversion was preempted by the federal Copyright Act. *Id.* at *13*14 [*4]
4. Pentagen's claim for misappropriation of trade secrets – which was not in fact asserted in any of its com-plaints – was dismissed for failure to state a cause of action, because "Pentagen has not alleged any facts to support a finding that CACI owed Pentagen a duty of confidentiality." *Id.* at *15.

Pentagen appealed the dismissal, but withdrew the appeal without filing a brief, and the Court of Appeals dismissed the appeal on May 25, 2000.

DISCUSSION

Pentagen now moves to vacate Judge Mukasey's decision pursuant to Fed. R. Civ. P. 60(b)(6), which permits a court to "relieve a party. . . from a final judgment" for "any other reason [besides such matters as mistake, newly discovered evidence, or fraud] justifying relief from the operation of the judgment." This Court has summarized the law governing relief from judgment under Rule 60(b):

> "Rule 60(b) is designed to strike a balance between serving the ends of justice and preserving the finality of judgments. A motion. for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances. In addition to demanding that the movant show exceptional circumstances, the courts of this circuit also require that the~ evidence in support of the motion be highly convincing, that the movant show good cause for the failure to act sooner, and that no undue hardship be imposed on the other parties as a result."

Freedom, N.Y., Inc. v. United States, 438 F. Supp. 2d 457, 462 (S.D.N.Y. 2006) (citations and internal quotation marks omitted).

While any motion under Rule 60(b) requires "exceptional circumstances," this requirement applies with special force to motions brought pursuant to the residual catchall clause of Rule 60(b)(6). Where a party seeks to vacate a judgment based even on such compelling [*5] circumstances as newly discovered evidence or fraud, the motion must be made within one year after the judgment was entered. Fed. R. Civ. P. 60(b). Subsection (6) provides no such time limit. Accordingly, courts have been careful to prevent Rule 60(b)(6) from becoming a vehicle to evade the requirements of the more specific subsections of the rule. As the Second Circuit held in *United States v. Int'l Brotherhood of Teamsters*, 247 F.3d 370, 391-92 (2d Cir. 2001), "if the reasons offered for relief from judgment can be considered in one of the more specific clauses of Rule 60(b), such reasons will not justify relief under Rule 60(b)(6)."

To the extent that Rule 60(b) permits collateral attacks on judgments based on fraud or newly-discovered evidence to be made outside the one-year window applicable to motions under Rule 60(b)(2) and (3), "the type of fraud necessary to sustain such an [attack on] the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion" under the rule. *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988). Fraud upon the court, which is required for such an attack to succeed, is "limited to fraud which seriously affects the integrity of the normal process of adjudication," *Id.* at 559, includes "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases," *Kupferman v. Consol. Res. & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972), and must be established by "clear and convincing evidence," *King v. First American Investigations, Inc.*, 287 F.3d 91,95 (2d Cir. 2002). *See also Hadges v. Yonkers Racing Corp*, 48 F.3d 1320, 1325 (2d Cir. 1995).

Pentagen's motion clearly cannot meet these standards. While Pentagen's lengthy submission is hardly a model of clarity, its central contention is that in 2000 it discovered new [*6] evidence that the Government had tested a derivative version of Mentix in 1991, and that this evidence radically altered the factual picture relevant to its claims, and demonstrates that CACI misrepresented certain facts to the Court. (P. Mem. 2-3; P. Reply Mem. 2-4.) But Pentagen's motion discloses on its face that this new evidence, and any evidence of fraud allegedly committed by anyone in withholding it from this Court, is pre-

sented here far too late, and in any event has no bearing on Judge Mukasey's decision dismissing Pentagen's claims.

First, the motion is untimely. Pentagen's motion is in essence a claim based on newly- discovered evidence or fraud, and therefore should properly be brought under Rule 60(b)(2) or (3), which are governed by a one-year limitations period. Teamsters, 247 F.3d at 391-92. This motion is brought more than ten years after judgment was entered. Even if the motion were properly made under Rule 60(h)(6), it would nevertheless have to have been brought in a timely manner. *See Rodriguez v. Mitchell*, 252 F.3d 191, 201 (2d Cir. 2001) (holding that delay of three and one-half years in bringing Rule 60(b)(6) motion was unreasonable). The centerpiece of Pentagen's claim of fraud is testimony given by one Edgar Brasseur in a deposition in related litigation in England. But this testimony was given in 2000. (*See, e.g.*, P. Reply Mem. 3: "2000 was the watershed year in which [Brasseur] was finally deposed"; "Brasseur's testimony established conclusively that a 3090 MVS version of Mentix existed and was tested by the Government.") Pentagen filed this motion in November 2006 and provides no explanation whatsoever for failing to have filed until more than six years after the allegedly crucial new evidence was uncovered.[11]

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[11] Essentially the same arguments, based on the same Brasseur testimony, were presented to the Eastern District of Virginia in 2002 in a Rule 60(b) motion directed at an earlier decision of that court, and the court found the motion untimely because "Pentagen. . . waited almost two years to bring this supposedly new evidence to the attention of this Court. *CACI Int'l, Inc. v. Pentagen Technologies Int'l Ltd.*, No. 93-163 1-A, at 8 (E.D. Va. Apr. 10, 2002) (unavailable in electronic databases).

[*7.]

Second, as is evident from the brief summary provided above, Judge Mukasey's opinion in this case was not based on any factual representations made by CACI. Nothing in that opinion turns on any factual conclusion about whether the Government or CACI tested versions of Mentix in 1991, or relies on any evidence or representation by CACI on that subject. Indeed, the judgment of this Court did not rest on any facts about Pentagen's underlying claims at all. Most of the allegations were dismissed for failure to state a claim on purely legal grounds that accepted as true the facts of Pentagen's complaint; the remainder were dismissed as precluded by the Virginia judgment.

Pentagen appears to concede as much. Its briefing hardly mentions Judge Mukasey' s ruling (to which the instant motion is ostensibly addressed), and instead focuses primarily on explaining why, in its view, the 2000 evidence undermines the Virginia decision. (P. Mem. 2-3, 5-12, 14, 20-22, 25, 27-32; P. Reply Mem. 5-6, 7, 9-10.) But even if Pentagen were correct that a Rule 60(b) motion directed to the Virginia decision would have merit (and this Court has no reason to think that it would), this Court has no power to grant a motion undoing the Virginia judgment, nor any conceivable reason to revoke its prior ruling giving that judgment preclusive effect. This is particularly so given that Pentagen has already made such a motion in Virginia and been rebuffed. In April 2002, Pentagen made in the Eastern District of Virginia essentially the same motion it has now made here.

The motion has not become more timely in the intervening four years.

The District Court there not only denied the motion and awarded attorneys' fees and costs to CACI, but found Pentagen's position sufficiently meritless to warrant an injunction prohibiting Pentagen "from filing or attempting to initiate any new [*9] lawsuit ... in ... the Eastern District of Virginia against ... persons or entities who have been [its] adversaries in past proceedings, without first obtaining leave." *CACI Int'l, Inc. v. Pentagen Technologies Int'l Ltd.*, No. 93-1631-A at I (Hon. James C. Cacheris, J.) (E.D. Va. Apr. 10, 2002).(unavailable in electronic databases); *see also* No. CV-93- 1631-A, 2002 WL 32843931 (S.D. .Va. Aug. 29, 2002). To the extent that Pentagen's argument rests on some convoluted proposition that the Virginia judgment is somehow not entitled to preclusive effect because that judgment was limited to particular issues, any such argument is not dependent on any new evidence or alleged fraud, and could and should have been made in responding to CACI's original motions.

Thus, Pentagen has shown no basis whatsoever that would justify reopening the litigation in this Court or vacating the judgment entered by Judge Mukasey in 1996.

CONCLUSION

Pentagen's motion pursuant to Rule 60(b)(6) is denied.

SO ORDERED.

Dated: New York, New York
February 23, 2007

/s/

GERARD E. LYNCH
United States District Judge

c. S.D.N.Y. Order Denying Motion for Reconsideration of Judge Gerald E. Lynch dated March 6, 2007 (endorsed).

Heading as above:

NOTICE OF MOTION OF PLAINTIFF FOR RECONSIDERATION OF MOTION TO VACATE FINAL JUDGMENT UNDER LOCAL CIVIL RULE 6.3 AS TO 94 CIV. 0441 UNDER FED. R- CIV. P. 60(B)(6).

PLEASE TAKE NOTICE that upon the concurrently filed memorandum in support, Plaintiff, Pentagen Technologies International Ltd ("plaintiff", or "Pentagen") by its attorneys, Ambrose M. Richardson, III, will move this Court, before the Honorable Gerald E. Lynch, at the United States Court House, Courtroom 6B, 500 Pearl Street, New York, New York 10007-1581, on __th day of April, 2007, at 9:30 am. or so soon thereafter as counsel may be heard, pursuant to Local Civil Rule 6.3, vacating the Order issued February 24, 2007 denying Plaintiffs' Motion to Vacate under Fed. R. Civ. P. 60(b)(6), and permitting reconsideration, reargument and relief on the grounds that the Court has overlooked certain key legal and factual issues as set out below that compels the conclusion that the court should not have denied the Motion, and such other order as the court thinks fit and proper.

Dated: New York, New York
March 5, 2007

Respectfully submitted

/s/

Ambrose M. Richardson, III (AR-0704)
Independent Counsel for Judgment Creditors
40 Wall Street, 35th Floor

New York, New York 1005
(212) 530-4771

CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury that on this 5th day of March, 2007, a copy of the foregoing Plaintiff's Motion to Reconsider and Vacate and Memorandum in Support and other papers noted therein was served on:

VIA FIRST CLASS MAIL

[ENDORSEMENT IN HAND]

The Motion is denied. The Court absolutely did consider Judge Sprizzo's rulings which were extensively discussed in Pentagen's original motion papers. They were not discussed in the Court's Opinion because they have no bearing on the motion to reconsider or reopen Judge Mukasey's decision, which was based on grounds unaffected by any of Pentagen's arguments. The motion for reconsideration is entirely frivolous.

SO ORDERED
/s/
GERARD E. LYNCH, USDJ
3/6/07

2. JUDGE MUKASY'S DECISIONS

a. Judge Mukasy's Decision dated July 15, 1996

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,
Plaintiff,

–against–

CACI INTERNATIONAL INC., CACI SYSTEMS INTERNATIONAL, INC., CACI, INC.-FEDERAL,
Defendants.

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,
Plaintiff,

–against–

CACI INTERNATIONAL INC., CACI SYSTEMS INTERNATIONAL, INC., CACI, INC.-FEDERAL AND THOMAS M. MARSHALL,

Defendants.

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,

Plaintiff,

–against–

J.P. LONDON,

Defendant.

93 Civ. 8512 (MBM),

94 Civ. 0441 (MBM),

94 Civ. 8164 (MBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 9903

July 15, 1996, Decided

July 16, 1996, FILED

SUBSEQUENT HISTORY: [*1] As Amended August 1, 1996.

Reconsideration GRANTED August 1, 1996, Reported at: 1996 U.S. Dist. LEXIS 10907.

DISPOSITION: Defendants' motion to dismiss the complaint granted, and the other motions moot.

COUNSEL: APPEARANCES:

JOEL Z. ROBINSON, ESQ., Law Offices of Joel Z. Robinson and Co., (Attorney for Plaintiff), New York, NY.

JAMES M. DAVIS, ESQ., Owen & Davis, (Attorney for Defendants), New York, NY.

J. WILLIAM KOEGEL, JR., ESQ., Steptoe & Johnson, (Attorney for Defendants), Washington, D.C.

JUDGES: Michael B. Mukasey, U.S. District Judge

OPINION BY: Michael B. Mukasey

OPINION: AMENDED OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

These multi-party, multi-state, multi-claim and seemingly ever-multiplying consolidated cases concern the legal rights to a computer software program named "MENTIX." Pentagen Technologies International, Ltd. owns that software and claims that defendants have violated its copyright, trademark and property rights in MENTIX. Defendants have moved jointly to dismiss the complaints, or alternatively, to transfer the litigation to the Eastern District of Virginia. Plaintiff has moved for summary judgment on certain of its claims. For the reasons that follow, defendants' motion to dismiss the complaint is granted, and the other motions therefore are [*2] moot.

I.

Although these are three separate actions against CACI, International, Inc., and its affiliated entities and personnel, all three actions arise from the same set of facts. Therefore, those facts, viewed in the light most favorable to plaintiff, are presented together.[12]

HISTORY OF MENTIX

MENTIX Is a computer program capable of translating other computer programs from one programming language into another. John Baird, Sebastian K. Shaumyan and Robert R. Lane developed the MENTIX software. (0441 Compl. PP 13-14) Thereafter,

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[12] The three complaints pending here are referred to as follows: the "0441 Complaint," the "8512 Complaint," and the "London Complaint."

Baird and his co-inventors assigned their rights in MENTIX to Pentagen, a British corporation that maintains an office in Manhattan. (*Id.* PP 14-15) Pentagen then licensed Baird Technologies, Inc. ("BTI"), a Delaware corporation owned largely by Pentagen, to provide MENTIX to third-party end users. (*Id.* P 10) At all relevant [*3] times, Baird and Mitchell R. Leiser were officers and directors of Pentagen and BTI. In February 1989 and thereafter, Pentagen affixed a notice of copyright to all copies of MENTIX offered for sale in the United States, but Pentagen did not register a copyright with the United States Copyright Office until December 7, 1993. (*Id.* PP 17-18)

In Spring 1990, Pentagen and BTI began to market MENTIX to the Army Material Command ("AMC"), a unit of the United States Army. AMC was interested principally in MENTIX's capacity to translate computer programs from COBOL into ADA. But AMC was concerned about dealing with the British-owned companies because of their inexperience in working with the U.S. government, and because of the requirements of the Buy America Act. To overcome those obstacles, BTI sought to team with CACI, International, Inc., a "widely known computer systems integration specialist" experienced in doing business with the American government. (8512 Compl. PP 19-20) CACI International, Inc. is the parent company, and CACI Systems International, Inc. and CACI, Inc.-Federal are both wholly-owned subsidiaries, (referred to collectively as "CACI"). All of the CACI companies are [*4] Delaware corporations that maintain their principal places of business in Fairfax, Virginia. (*Id.* P 4) Dr. Jack P. London is Chairman of the Board, president and chief executive

officer of CACI International. London lives in Virginia. (London Compl. P 2)

Throughout Spring 1990 representatives of BTI met and corresponded with representatives of CACI to work out an arrangement whereby BTI and CACI would jointly market MENTIX to the Army and to other users. (8512 Compl. PP 21-26) In May 1990 AMC tested MENTIX and achieved positive results: AMC was impressed with MENTIX's translation speed and ease of use, and indicated that there was a good chance that the Army would "become a major client." (*Id.* P 27 & Ex. B) On July 31, 1990, CACI submitted a proposed teaming agreement to BTI for signature, naming only CACI-Federal and BTI as parties to the agreement. (*Id.* P 26; Pl. Mem. Ex 2)

Enter Robert O'Brien, an American investor who owns and operates Runaway Development Group S.A. ("RDG"), a Panamanian corporation, and Expert Objective Systems Development Corporation ("EOSD"), a Delaware corporation, both with principal places of business in Virginia. (8512 Compl. PP 11-12) According [*5] to plaintiff, in Summer 1990, O'Brien, RDG, EOSD, and others "unlawfully planned to seize [Pentagen's] property including MENTIX . . . to their own use and benefit by removing the property from [Pentagen] and transferring possession of the property without right and to its own use and benefit." (*Id.*, P 30) Accompanied by two armed men, on August 13, 1990, defendant Thomas M. Marshall, an officer, director and attorney for BTI, "cornered Baird and stole a Toshiba laptop computer owned by [Pentagen] containing on its hard disk among other items, a computer program and the computer source

code relating to MENTIX. RDG Group at the same time seized control of BTI." (*Id.* P 33)[13]

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Two days after this unusually hostile takeover, CACI-Federal entered into a revised Teaming Agreement with BTI. This time, CACI-Federal, BTI, O'Brien and EOSD were named as parties to the agreement. (*Id.* PP 34-35) All parties promised to keep secret for the term of the agreement and five years thereafter all confidential and proprietary information obtained in connection with the agreement. (Pl. Mem. Ex. 2 P 6) In addition, BTI, EOSD and O'Brien warranted to CACI that they had

> good title to or adequate right to license MENTIX and, so far as they are aware, to the MENTIX-MVS product contemplated herein and, they represent and warrant that to the best of their knowledge and belief, the modification of MENTIX, creation of derivative works therefrom and licensing of such deriva-

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[13] Although not found in any of the three complaints pending here, the following history is disclosed in the summary judgment decision of the Eastern District of Virginia (the "Virginia action"), dated June 16, 1994: In 1989, through RDG, O'Brien invested $400,000 in Pentagen. In return, O'Brien and RDG received common stock with an option to convert that stock into secured promissory notes from Pentagen. In Summer 1990, RDG exercised its option to convert its Pentagen stock into notes and received promissory notes from Pentagen secured by MENTIX. When Pentagen defaulted on those notes O'Brien asserted ownership of the software through RDG and EOSD. (Def. Mem. Ex. 2 at 2) Pentagen contends that RDG's takeover of it and MENTIX was illegal because English law, which governed the investment, does not al-low equity interests to be converted into secured loans, and therefore that RDG's security interest was void. (*Id.* at 4)

> tive works in the form of MENTIX-MVS as contemplated herein will not infringe any United States or foreign patent, trademark, copyright or other intellectual property rights of others and that no claim may be asserted with respect to such activities except the royalty rights of NSL discussed in Section 5(a) above.

(*Id.* P 9(a)) O'Brien, EOSD and BTI further promised to indemnify, defend, [*7] and hold CACI harmless from liability in the event of any infringement or title action against CACI. (*Id.*) The agreement states that it "shall be governed by and construed in accordance with the substantive laws of Virginia and any judicial action shall be initiated and maintained in a court of competent jurisdiction in such state." (*Id.* P 16) Robert O'Brien signed the agreement for himself, BTI and EOSD. (*Id.*)

Pentagen was not a party to the agreement and neither Baird nor Leiser signed it. Plaintiff contends that RDG explained to CACI its plan to seize MENTIX (8512 Compl. P 31), and that at the time the Teaming Agreement was executed, RDG showed CACI certain title documents that "on their face" demonstrated that the RDG Group did not have property rights in MENTIX. (*Id.* P 34) By letter dated August 20, 1990, Pentagen warned RDG that RDG "was not entitled to certain of the property that had been seized by RDG and EOSD." (*Id.* P 36) A month later, on September 27, 1990, Raymond L. Rollins, Director of Contracts for CACI-Federal, wrote to O'Brien to express CACI's concern about the "ongoing and escalating dispute" between RDG and Pentagen about the ownership of MENTIX. [*8] (0441 Compl. Ex. C) Rollins reminded O'Brien of his warranty of

title in Section 9(a) of the Teaming Agreement and demanded written verification of ownership of MENTIX within ten days, absent which CACI would declare a default.[14]

After the revised teaming agreement was executed, O'Brien gave CACI a copy of the MENTIX source code. (*Id.* P 37) CACI made a copy for itself and returned the original to O'Brien. CACI then began to market MENTIX to AMC. (*Id.* P 38) CACI continued to market MENTIX to AMC throughout Fall 1990. It drafted written proposals, made oral presentations, and conducted MENTIX demonstrations. (*Id.* PP 42-46)

Almost a year later, Pentagen began to notify the pertinent players of its property rights in MENTIX. On September 27, 1991 Baird called London and notified him of Pentagen's ownership rights in MENTIX. (London Compl. P 21; Pl. Mem. [*9] Ex. 12) Subsequently, Baird wrote London and notified him that AMC had concerns about a possible MENTIX contract because of the title dispute. In response, London wrote Baird on October 3, 1991 telling them that

> CACI has not been awarded a contract by the U.S. Army, and CACI has not been solicited to offer a proposal to perform work for the U.S. Army that relates in any way to the subject matter of your letter [MENTIX].

(London Compl. P 25 & Ex. B) Pentagen concedes that "the factual content of Dr. London's letter was literally true," but contends that the letter was a fraudulent representation that deprived Pentagen of

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[14] The Virginia Court's summary judgment decision states that O'Brien provided the requested written verification of title. (Def. Mem. Ex. 2 at 5)

its ability to win a contract with the government for MENTIX. (*Id.* P 28)

Sometime in January 1992 the designation of AMC funds for MENTIX expired and those funds were allocated to other projects. (*Id.* P 56) Shortly thereafter, CACI wrote O'Brien and Baird to cancel the Teaming Agreement because of the failure to obtain a contract with AMC and because the Teaming Agreement expired. (London Compl. P 37 and Pl. Mem. Ex. 3) Simultaneously, CACI returned its copy of MENTIX, along with the documentation and source code, to RDG. (*Id.*) Pentagen [*10] contends that the wording of that letter created the obviously incorrect "impression that there was no further interest in Pentagen's Intellectual Property," and that that misrepresentation enabled CACI to exploit MENTIX and win the SBIS contract with IBM. (Pl. Mem. at 79)

In February 1992, the Army's Sustaining Base Information Services Program ("SBIS") solicited proposals to modernize its information management systems. A year-and-a-half later, IBM announced that it had been awarded the SBIS contract, and that CACI was a sub-contractor on that contract. (0441 Compl. P 59) CACI was to assist with application software development, configuration management, and simulation and integration logistics support, and receive approximately $70 million for its work. (*Id.* P 60) Pentagen alleges that the software to be developed by CACI for the SBIS contact is "strikingly similar" to MENTIX, and that it will achieve the same results as could have been achieved with MENTIX. (*Id.* PP 92-93)

LITIGATION

A. The RDG Action

In August 1991, shortly before Pentagen began to assert its ownership rights in MENTIX, RDG sued Pentagen, Baird and Leiser for securities fraud, breach [*11] of contract, and fraudulent inducement, before Judge Sprizzo of this Court. *Runaway Dev. Group, S.A. v. Pentagen Technologies Int'l Ltd.*, 91 Civ. 5643 (JES) (the "RDG action"). Pentagen counterclaimed for a declaration that it was the rightful owner of MENTIX and for damages resulting from RDG's alleged conversion of MENTIX. CACI was not a party to that action.

Two years later, in August 1993, the RDG action settled. (*Id.* P 61(b) and Ex. F) RDG dismissed its complaint, admitted that Pentagen owned MENTIX, returned all copies of the MENTIX documentation and source code to Pentagen, and agreed to pay $1.7 million to Pentagen on the counterclaims. (0441 Compl. Ex. F PP 3A, 3D, 3F) In return, Pentagen dropped its counterclaim against O'Brien individually and the parties exchanged releases from any additional debts and liabilities. (*Id.* P 3C)

B. 94 Civ. 0441

Just before the RDG action settled, on July 1, 1993, Pentagen commenced its first suit against CACI (the parent and subsidiary corporations) in New York Supreme Court. Pentagen sued also Thomas M. Marshall, an officer, director and attorney for BTI. On January 26, 1994, after a non-diverse party was dismissed, [*12] CACI removed that case to this court. Pentagen then amended its complaint to add certain federal claims. As amended, the 94 Civ. 0441 complaint alleges ten claims against CACI and six

against Marshall. *Pentagen Technologies Int'l, Ltd. v. CACI Int'l Inc.*, No. 94 Civ. 0441 (MBM) (S.D.N.Y.).

Pentagen asserted five federal claims against CACI: (1) unauthorized use of copyrighted material by using MENTIX without permission; (2) trademark infringement by using the name "MENTIX" on intellectual property and publications; (3) punitive damages of $234 million for wanton and willful infringement of Pentagen's copyright and trademark; (4) major fraud against the United States in violation of 18 U.S.C. § 1031; and (5) copyright infringement by copying MENTIX.

Pentagen asserted state law claims of: (6) conversion and misappropriation of property; (7) violation of § 165.00 of New York State Penal Law – unauthorized use of collateral (the intellectual property); (8) violation of § 2C: 20-3 of the Virginia Criminal Code – theft of intellectual property; (9) violation of § 165.07 of New York Penal Law – unauthorized reproduction of secret scientific material; and (10) violation of [*13] § 2C: 20-23 of the Virginia Criminal Code – theft of computer software.

Pentagen asserted the same five state claims against Marshall and an additional claim of breach of fiduciary duty. Marshall has not joined in the present motion and, as yet, has not filed a motion individually.

C. 93 Civ. 8512

Just before CACI removed Pentagen's first case to federal court, on December 9, 1993, Pentagen filed in federal court a second suit against CACI. That suit, docketed as *Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.*, No. 93 Civ. 8512 (MBM) (S.D.N.Y.), named only the CACI entities as defendants and asserted

the same five federal claims added to the 94 Civ. 0441 action after it was removed, supra p. 9.

D. The Virginia Action

On December 22, 1993, two weeks after Pentagen filed the 93 Civ. 8512 action here, CACI filed suit in the Eastern District of Virginia (the "Virginia action"), before Judge Leonie M. Brinkema. *CACI Int'l Inc. v. Pentagen Technologies Int'l, Ltd.*, Civil Action No. 93-1631-A (E.D.Va.). CACI sought declarations that: (1) its marketing to AMC did not infringe Pentagen's MENTIX copyright; (2) its marketing to AMC did not infringe Pentagen's [*14] MENTIX trademark; (3) its RENovate engineering methodology did not infringe the MENTIX copyright; and (4) its work on the SBIS contract did not and could not infringe the MENTIX copyright. CACI also sought damages for: (5) breach of contract; (6) Pentagen's tortious interference with the SBIS contract; and (7) defamation per se.

Pentagen moved to dismiss the complaint on the basis of the first filed rule and lack of personal jurisdiction, or alternatively, to transfer to this district. Judge Brinkema denied both of Pentagen's motions and the parties proceeded with discovery. BTI, also a named defendant, never filed an answer. Accordingly, on March 17, 1994 the Court entered a default judgment against BTI, requiring BTI to indemnify CACI and hold it harmless for Pentagen's claims, as required by Paragraph 9(a) of the Teaming Agreement. See supra p. 5. On May 27, 1994, I placed the actions before me on the suspense docket, pending resolution of the pre-trial motions in the Virginia action.

On June 16, 1994, in a written opinion and order, the Virginia Court granted summary judgment for

CACI on its claims of copyright and trademark infringement, and found liability on CACI's claims [*15] of tortious interference and defamation per se.

First, Judge Brinkema explained that the registration of a copyright is a prerequisite to an infringement claim and that the statute of limitations for copyright infringement is three years. Because Pentagen had not registered its copyright until December 7, 1993, any allegedly infringing activities before December 7, 1990 were not actionable. Accordingly, Pentagen's claim based on CACI's creation of a backup copy of MENTIX in September 1990 and CACI's marketing to AMC in Fall of that year, was barred by the statute of limitations. (*Id.* at 8-9)

Second, the Court held that CACI's marketing to AMC after December 7, 1990, without distribution of any software, did not constitute copyright infringement. There was no evidence that CACI had distributed a copy of MENTIX, or any derivative material to AMC in the prescribed period. Accordingly, there was missing a fundamental element of a claim of copyright infringement – proof that the work was copied, directly, or by proof of access and substantial similarity. (*Id.* at 9-10)

Third, the Court addressed CACI's work on the SBIS contract. The Court found that CACI had returned its [*16] copy of MENTIX before the government began to solicit proposals for the SBIS project, and that there was no evidence that CACI created a product substantially similar to MENTIX, or that MENTIX could fulfill the SBIS specifications. (*Id.* at 10-11) Therefore, the Court concluded, CACI's involvement with the SBIS project did not and would not infringe Pentagen's MENTIX copyright.

Fourth, the Court considered whether CACI's use of the word MENTIX in marketing to AMC constituted trademark infringement or unfair competition. Because the statute of limitations for trademark infringement is two years and Pentagen filed its first federal suit against CACI in December 1993, the Court found there could be no claim for trademark infringement based on activity before December 1991. Because Pentagen's trademark claims were based entirely on conduct before December 1991, the Court concluded that they were time-barred. (*Id.* at 11-12)

Fifth, the Court found that CACI's breach of contract claim suffered from an important defect – CACI had not contracted with Pentagen, but only with BTI. Judge Brinkema refused to pierce the veil between Pentagen and BTI because she found that the two were [*17] separate entities, maintained separate records and observed corporate formalities. (*Id.* at 12-14) Accordingly, summary judgment on that claim was denied.

Sixth, the Court found that, under Virginia law, Pentagen tortiously had interfered with CACI's business relations with IBM, by threatening to sue IBM, other subcontractors and the Army because of their association with CACI. The Court reserved a ruling on damages. (*Id.* 14-15)

Seventh and finally, the Court found that Pentagen had defamed CACI in its trade and business, by stating publicly that CACI had infringed Pentagen's copyright and trademark and that CACI's RENovate technology merely was a copy of MENTIX. Further, the Court concluded that Pentagen made those statements with malicious intent, and awarded punitive damages to CACI, in an amount to be determined at trial. (*Id.* at 15-17)

Shortly after ruling on the summary judgment motions, Judge Brinkema held a bench trial to determine the damages suffered by CACI as a result of Pentagen's tortious interference and defamatory conduct. At the end of trial, on August 8, 1994, the Court reversed its finding of tortious interference because of insufficient evidence of [*18] damage. The Court awarded CACI a total of $183,050 in damages: $1000 in compensatory damages and $10,000 in punitive damages for defamation, and fees and costs for the copyright claims totaling $172,050. (Def. Mem. Ex. 3)

Pentagen then moved for recusal of the district judge, alleging that she was partial because her husband, who worked for the Administrative Office of the United States Courts, had authorized an unrelated contract to CACI, and because he pursued an interest in computer translation software. Judge Brinkema denied the motion and the Fourth Circuit denied Pentagen's request for mandamus in a one-sentence order.

On January 16, 1995, in an unpublished, per curiam decision, the Fourth Circuit affirmed Judge Brinkema's rulings in all respects. *CACI Int'l, Inc. v. Pentagen Technologies Int'l, Ltd.*, 70 F.3d 111 (TABLE), Nos. 94-2058, 94-2220, 1995 WL 679952 (4th Cir. 1995).

E. The London Action

After losing in Virginia, on September 27, 1994 Pentagen filed yet another suit against a CACI affiliate relating to the MENTIX matter. This time, Pentagen sued CACI's president and chairman, Dr. Jack P. London, in New York State Supreme Court. London removed [*19] the case to this court, and I accepted it as related to the other two Pentagen mat-

ters already before me. *Pentagen Technologies Int'l, Ltd. v. J.P. London*, No. 94 Civ. 8164 (MBM). In that action, Pentagen sued London on three state-law claims: (1) fraudulent misrepresentation; (2) negligent misstatement; and (3) breach of fiduciary duty.

F. The Qui Tam Action

Pentagen then filed an action styled *U.S. ex. rel. Pentagen v. CACI, Int'l, Inc.*, No. 94 Civ. 2925 (RLC), before Judge Robert Carter of this Court. That action was a qui tam action under the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33 (1994). As a qui tam relator, Pentagen sued on behalf of the United States, alleging that CACI had filed false claims with the government when it marketed MENTIX to AMC and when it acquired the SBIS contract with IBM. The government declined to intervene.

In January 1996, Judge Carter dismissed Pentagen's complaint for lack of subject-matter jurisdiction pursuant to § 3730(e)(4)(A) of the FCA. 1996 WL 11299 (S.D.N.Y. Jan. 4, 1996). That section provides that jurisdiction exists for a qui tam complaint based on allegations that are publicly disclosed, [*20] only if the relator was an original source of those allegations. Because the Court found that Pentagen's claims were based on public allegations and that Pentagen was not an original source of those allegations, subject-matter jurisdiction did not exist. *Id.* at **8, 12.

II.

Determining the preclusive effect of a judgment of a federal court is a matter of federal law. *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 n.2 (2d Cir.), cert. denied, 464 U.S. 936, 78 L. Ed. 2d 311, 104 S. Ct. 344 (1983). Res judicata, or claim preclusion, bars re-

litigation of a claim where a court of competent jurisdiction has rendered: (1) a final judgment on the merits, (2) in a case involving the same parties or their privies, (3) where the same cause of action is asserted in the later litigation. *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 639 (2d Cir.), cert. denied, 484 U.S. 992 (1987). Res judicata binds parties and their privies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Harborside Refrigerated Servs., Inc. [*21] v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992). In other words, res judicata requires a party to bring in one litigation all its claims arising from a particular transaction. Thus, res judicata ensures the finality of judgments, "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 132, 60 L. Ed. 2d 767, 99 S. Ct. 2205 (1979) (superseded on other grounds by the Bankruptcy Code).

Pentagen argues that the judgment entered in *Runaway Development Group S.A. v. Pentagen Technologies, et al.*, 91 Civ. 5643 (JES), in which RDG admitted that Pentagen owned MENTIX, should have res judicata effect here. The first question is whether a settlement qualifies as a judgment "on the merits" as opposed to a judgment on jurisdiction or some other procedural matter. The answer to that question is yes. Federal law provides that a consent judgment qualifies as a final judgment on the merits entitled to res judicata effect in a subsequent litigation between the parties to the consent decree over the same cause of action. Amalgamated Sugar, 825 F.2d at 639.

However, like any other court order, [*22] or any other contract for that matter, a consent judgment has no binding power over entities that are not parties or privies of parties to it. CACI was not named by either RDG or Pentagen in any of the claims or counterclaims, did not participate in discovery in that action, and did not participate in the discussions and negotiations that resulted in the consent decree. Pentagen argues that because CACI was RDG's coventurer, CACI was in privity with RDG and therefore is barred from relitigating the issues settled by the consent decree. In support of that position, CACI directs my attention to Paragraph 9(a) of the Teaming Agreement, which states in pertinent part:

> (a) Warranty of Title . . . If any [claim for patent, copyright or trademark infringement] is asserted, [O'Brien, BTI and EOSD] shall indemnify and hold CACI harmless with respect to all such matters, and shall (i) defend at its own expense, (ii) obtain through negotiation or (iii) modify the product to make it non-infringing while preserving the original functionality, so as to enable the parties to continue using such products as originally intended under this Agreement.

(Pl. Mem. Ex. 2 P 9(a)). [*23] The contractual duties to indemnify and defend create a nexus between CACI and RDG that is fortified, Pentagen argues, by CACI's awareness of the title dispute between RDG and Pentagen. That nexus, Pentagen argues, renders CACI's interest in the RDG litigation sufficiently close to that of RDG itself to raise the bar of res judicata here.

I am mindful of the Circuit's admonition that "the doctrine of privity . . . is to be applied with flexibil-

ity." Amalgamated Sugar, 825 F.2d at 640. But Pentagen has not cited, and I have not found, any authority to support the proposition that one party is in privity with another simply because they are signatories to a contract. That CACI teamed with O'Brien to market MENTIX to AMC does not mean that its interests coincided with O'Brien's for all purposes. More specifically, that the Teaming Agreement obligated O'Brien, EOSD and BTI to indemnify and defend CACI in the event a title action was brought against CACI does not mean that CACI's interests were identical to its co-venturers' in the event those co-venturers faced counterclaims challenging their proprietary rights. The cited provision of the Teaming Agreement means only that if CACI [*24] is sued for infringement, conversion or misappropriation, O'Brien, EOSD and BTI are responsible. No provision assigning responsibility in the opposite direction – from CACI to O'Brien, EOSD, and BTI – was included in any version of the Teaming Agreement or agreed on by the parties. Because no CACI entity was in privity with any of the parties in the RDG litigation, the RDG settlement has no impact here.

III.

CACI too invokes res judicata, arguing that the Virginia action bars all of Pentagen's claims against it, its subsidiaries and London in the three actions pending before me, 94 Civ. 0441, 93 Civ. 8512, and the London action.

Again, it is necessary to determine first if the prior judgment is final and on the merits. Under federal law, a dismissal on statute of limitations grounds constitutes a final judgment "on the merits." Federal Rule of Civil Procedure 41(b) states:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the [*25] merits.

Fed. R. Civ. P. 41(b) (1994). It follows, and the Second Circuit has held, that "a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits, unless it is specifically stated to be without prejudice." PRC Harris, 700 F.2d at 896. This is true even if the statute of limitations in the second jurisdiction is longer than that in the first. The Virginia Court, in ruling that Pentagen's copyright and trademark claims were time-barred, did not specifically state that the dismissal was without prejudice. Accordingly, the Court's decision on those claims was "on the merits" and therefore satisfies the first element of claim preclusion.

The second element of claim preclusion is satisfied easily with respect to Pentagen's claims against the CACI entities because the Virginia action involved only Pentagen and the three CACI entities.

Satisfaction of the third element of res judicata – identity of the cause of action – "depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is need to support both claims, and whether the facts essential to the second were [*26] present in the first." *Prime Management Co. v. Steinegger*, 904 F.2d 811, 815 (2d Cir. 1990). Res judicata bars subsequent claims brought by either the plaintiff or the defendant to the original action. Specifically, the defendant is prohibited from asserting in the second action

compulsory counterclaims, as defined by Fed. R. Civ. P. 13(a), not raised in the first. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1, 41 L. Ed. 2d 243, 94 S. Ct. 2504 (1974); *Scott v. Long Island Savs. Bank, FSB*, 937 F.2d 738, 742 (2d Cir. 1991).

Pentagen's federal claims of copyright and trademark infringement asserted here clearly arise from the same series of transactions that were at issue in the Virginia action, and Pentagen makes no argument to the contrary. The facts on which those claims are based – CACI's marketing efforts with AMC – and the evidence necessary to prove those facts, are identical to those considered by Judge Brinkema. Accordingly, I am presented here with a paradigm of the situation that res judicata is intended to avert and resolve. Another court has rendered a final decision on the same claims, between the same parties. To allow Pentagen to relitigate [*27] those claims against CACI here would waste the resources of the parties and this court, clog the court systems in at least two jurisdictions, and undermine the finality of the Virginia Court's decision in violation of the fundamental tenets of res judicata. Therefore, claims 1-3 and 5 of the 94 Civ. 0441 action, supra p. 9, and claims 1-3 and 5 of the 93 Civ. 8512 action, supra p. 10, must be dismissed.

IV.

The effect of the Virginia action on Pentagen's other claims against CACI and is less clear. In addition to its claims of copyright and trademark infringement, Pentagen contends here that CACI is liable to it for violation of the Major Fraud Act, several New York and Virginia statutes, conversion and misappropriation of property. Those claims were not

raised by either party in the Virginia action, and accordingly, were not decided by that Court.

Pentagen argues that those claims are not covered by the broad umbrella of res judicata, because CACI split its claim when it declined to seek declaratory judgments on the state law claims in the Virginia action, and thereby impliedly agreed to litigate those claims separately, in the New York actions. See *Kern Oil Refining [*28] Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir.) (holding that a party who was a defendant in two different, but related cases, and who failed to object to the maintenance of separate trials on separate issues, could not later object to the split), cert. denied, 488 U.S. 948, 102 L. Ed. 2d 367, 109 S. Ct. 378 (1988); see also Restatement (Second) Judgments § 26(1)(a) (1980) (stating that "part or all of the claim subsists as a possible basis for a second action . . . [when] the parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein").

In opposition, CACI argues that it never agreed to split its cause of action or to litigate certain claims in Virginia and certain claims here. CACI argues further that the additional claims arise from the same transaction or series of transactions and therefore, could have and should have been raised by Pentagen in its defense of the Virginia action. Both parties point to isolated remarks in the transcript of the Virginia proceeding, which they contend support their respective positions. Compare Def. Reply Mem. at 21-23 and Ex. 4 (citing its attorney's comment [*29] to Judge Brinkema that the Virginia action was "broader" than the New York actions, and plaintiff's attorney's acknowledgment that the discovery required in the Virginia action was the same as that

required in the New York action) with Pl. Mem. at 43-45 (citing Judge Brinkema's remarks that "this case is somewhat different although it's close to the New York case," and that "this case has some issues that are not the same as the ones in New York.").

Although it appears that Pentagen's additional claims do arise from the same transaction as do those decided by the Virginia court, it appears also that CACI deliberately limited the Virginia action to the infringement claims, and thereby implicitly agreed to litigate separately the other claims that had already been raised by Pentagen. CACI could have sought declarations on the other claims against it by Pentagen, but for whatever reason chose not to. I note also that the claims CACI faults Pentagen for failing to raise in the Virginia action do not qualify as compulsory counterclaims pursuant to Fed. R. Civ. P. 13(a), because "at the time the action was commenced the claim was the subject of another pending action." Fed. R. Civ. [*30] P. 13(a)(1); Gold Seal Liquors, 417 U.S. at 469 n.1. Because those counterclaims were not compulsory, Pentagen was not required to assert them in the Virginia action. Accordingly, those claims are not barred and must be resolved on other grounds.

V.

Plaintiff contends that the CACI entities are liable to it for violation of the Major Fraud Act, 18 U.S.C. § 1031 (1994). That statute, found in the Crimes and Criminal procedure title of the United States Code, prohibits a contractor, subcontractor or supplier with the United States from fraudulently procuring property or services from the United States. 18 U.S.C. § 1031(a) (1994). Violation of that statute may result in prosecution and imprisonment and/or a substantial

fine. *Id.* §§ 1031 (a)-(f). Nothing in the statute explicitly allows a private person to sue for fraud against the government, but plaintiff urges me to infer such a private right of action.

A court may infer the existence of a private right of action only when such an inference would fulfill Congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979); *Touche Ross & Co. v. Redington*, [*31] 442 U.S. 560, 575-76, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979). To ascertain that intent, a court may evaluate whether: (1) the plaintiff is a member of a class for whose special benefit the statute was enacted, (2) the legislative history supports the inference, (3) a private right would fit with the purposes of the underlying statutory scheme, and (4) the cause of action traditionally is reserved to state law. *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). However, a court may not simply apply these factors mechanically to generate a result; the touchstone always is Congressional intent, however that best is discerned. Transamerica, 444 U.S. at 23; Touche Ross, 442 U.S. at 575-76. Courts are especially loath to infer a private right of action from a criminal statute, and will do so only when there is a "statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Id.* at 79; see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 316, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979).

Here, there is no statutory basis for the conclusion that Congress intended to imply a private right of action under the Major Fraud [*32] Act. Unlike violations of most criminal laws, a violation of the Major Fraud Act does not injure directly any specific private party. Rather, that violation directly injures the

government, and injures private citizens only secondarily. When the government is so injured, it makes sense that only the government can sue.

Further, the Major Fraud Act, unlike the False Claims Act, under which Pentagen already has brought another suit, see supra p. 15, does not contain a qui tam provision allowing private parties to sue on behalf of the government. However, the Major Fraud Act does contain two related provisions. First, the Act authorizes the Attorney General to "make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section." 18 U.S.C. § 1031(g)(1). The Act then lists certain conditions that render a person ineligible for such a payment. *Id.* § 1031(g)(2). That Congress sought to enlist civilian enforcement of the Major Fraud Act by this method – investigative assistance – suggests that Congress did not intend civilian enforcement by any other method, including a private right of [*33] action.

Still further, the Major Fraud Act allows a person who participated in a government investigation pursuant to § 1031(g)(2), and who suffered adverse employment consequences as a result, to sue his employer. *Id.* § 1031(h). The presence of that section too demonstrates that Congress deliberately chose to make certain remedies available to private persons, and to make other remedies unavailable. Thus, the text and statutory scheme indicate that Congress did not intend to imply a private right of action under the Major Fraud Act, and no court has found otherwise. Accordingly, plaintiff's claim under that statute must be dismissed.

VI.

Plaintiff argues also that CACI converted and misappropriated its property in violation of New York state law. In defense, CACI argues first that the claim is governed by Virginia law, second, that the claim is preempted by the Copyright Act, and third, that even if not preempted, it must be dismissed for failure to state a claim upon which relief may be granted.

Before analyzing whether a federal law pre-empts a state law claim, it is necessary to identify which state's law applies so as to know the contours of the state law claim in question. [*34] A federal court sitting in diversity applies the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941). Therefore the choice-of-law rules of New York will determine which state's substantive laws govern Pentagen's claims.

New York courts employ "interest analysis" to resolve choice-of-law issues in multistate tort cases. *Babcock v. Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279 (1963). That approach aims to determine which jurisdiction has the greater interest in having its law govern the litigation by reviewing the contacts each state has with the litigation, and then assessing the relationship of those contacts to the purposes of the particular law at issue. *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 347, 575 N.Y.S.2d 796, 798, 581 N.E.2d 1042 (1991). In a case such as this, the significant contacts "are almost exclusively, the parties' domiciles and the locus of the tort." *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 95, 480 N.E.2d 679 (1985). When the parties are domiciled in different jurisdictions, [*35] the situs of the injury often tips

the scales in favor of one of those jurisdictions. *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 73-74, 595 N.Y.S.2d 919, 923, 612 N.E.2d 277 (1993); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 128-29, 335 N.Y.S.2d 64, 70, 286 N.E.2d 454 (1972).

Pentagen is a British corporation that maintains a New York office and the CACI entities all are Delaware corporations that maintain their primary offices in Virginia. The locus of a conversion is the state where the defendant's acts respecting the allegedly converted property are committed. *American Savs. Bank, F.S.B. v. Cheshire Mgmt. Co.*, 693 F. Supp. 42, 46 (S.D.N.Y. 1988); *Associated Trade Dev., Inc. v. Condor Lines, Inc.*, 590 F. Supp. 525, 528 (S.D.N.Y. 1984).

Plaintiff alleges that CACI is guilty of conversion because from July 31, 1990 to January 20, 1992 CACI "claimed and continued to claim rights of use and license to the Intellectual Property through the Teaming Agreement, and continued to deprive [Pentagen] of its rights to the property." (0441 Compl. P 96) CACI did so specifically by marketing MENTIX to AMC. (*Id.*) Pentagen's claim of misappropriation of property appears [*36] to be based on the same factual predicate. (*Id.*) This conversion and misappropriation, Pentagen contends, deprived it of the ability to market MENTIX to the Army, an injury worth $73.1 million (*Id.* P 101), and of the ability to market MENTIX to other government agencies or to private parties, an injury worth $78 million. (*Id.* P 102)

Pentagen argues that New York law governs its claim of conversion because CACI used a "non-resident joint adventurer" (RDG) to seize a New York corporation's intellectual property in New York. However, all of CACI's own actions occurred in its

home state of Virginia: it signed the Teaming Agreement and marketed MENTIX to AMC there. Pentagen does not allege that any representatives from CACI travelled to New York to assist RDG with the alleged armed break-in. Even if CACI were somehow involved in that episode, its involvement could have taken place only in Virginia. Accordingly, the consequences of those acts are controlled by Virginia law.

Virginia law defines conversion as "any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession." *Bader v. Central Fidelity [*37] Bank*, 245 Va. 286, 427 S.E.2d 184, 186 (Va. 1993) (quotations omitted). New York law is substantially the same, and defines conversion as the denial or violation by defendant of the plaintiff's dominion, rights, or possession of property. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487, 462 N.Y.S.2d 413, 415, 448 N.E.2d 1324 (1983).

With the contours of Pentagen's conversion claim in mind, it is possible to determine whether that claim is preempted. The Copyright Act of 1976 declares that

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any

> such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a) (1994). Section 106 grants the owner of a copyright the exclusive right [*38] to: (1) reproduce, (2) create derivative works from, (3) sell, (4) perform, and (5) display the copyrighted work. *Id.* § 106(1)-(5).

A state law claim asserting the deprivation of rights in a work protected by the copyright laws is preempted when the state law claim is qualitatively equivalent to a copyright infringement claim. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992). Another formulation explains that "when a right defined by state law may be abridged by an act which, in and of itself, would infringe one of the exclusive rights, the state law in question must be deemed preempted." *Harper & Row Pubs., Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). A state law claim is not preempted if it includes an "extra element" that renders it qualitatively different from a claim of copyright infringement. Computer Assocs., 982 F.2d at 716; see also *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 229 (4th Cir. 1993) (citing Computer Assocs. and Harper & Row and adopting the above-described framework for analyzing a claim of [*39] copyright preemption). Several courts in this Circuit have held, based on the facts presented, that a conversion claim equaled the copyright infringement claim, and therefore was preempted. See, e.g., Harper & Row, 723 F.2d at 201 (declaring preempted a conversion claim based on unauthorized publication of a manuscript); *Patrick v. Francis*, 887 F. Supp. 481, 484 (W.D.N.Y.

1995) (same); *Kakizaki v. Riedel*, 811 F. Supp. 129, 133 (S.D.N.Y. 1992) (holding preempted a conversion claim based on allegedly unauthorized use of a copyrighted photograph). Although I did not find any published Fourth Circuit or district court cases holding specifically that a state claim of conversion was preempted by the Copyright Act, because that Circuit employs the same test for copyright preemption, it appears that courts in that Circuit would so hold.

Here, Pentagen's claim for conversion is qualitatively equivalent to its claim for copyright infringement because that claim arises from the improper and unauthorized use of Pentagen's intellectual property, a copyrighted work. Pentagen's conversion claim includes no "extra element" that would withdraw it from the reach of federal preemption. [*40] Pentagen asserts that CACI converted MENTIX by marketing it to the AMC, but that is just another way of saying that CACI deprived Pentagen of its exclusive right to reproduce and sell MENTIX. Accordingly, Pentagen's conversion claim is preempted and must be dismissed.

To the extent Pentagen's claim for conversion is based on the physical taking of its computer hardware and software, that claim would not be preempted because it differs qualitatively from a claim of wrongful use or reproduction of a copyrighted work. See Harper & Row, 723 at 201; *Ronald Litoff, Ltd. v. American Express Co.*, 621 F. Supp. 981, 986 (S.D.N.Y. 1985); Nimmer on Copyright at § 1.01[B][1][i]. But that claim appears nowhere in any of the three complaints pending here, and even as presented in Pentagen's brief, it is extremely difficult to discern. As best I can gather, Pentagen reasons as follows: RDG stole Pentagen's computer diskettes

and its computer; because of the Teaming Agreement CACI is liable for the torts of its coventurers committed in furtherance of the venture; therefore, CACI is liable to Pentagen for conversion.

That claim, however, even if it were asserted in Pentagen's complaint, [*41] is insufficient. "Joint venturers, like partners, have the dual status of principals for themselves and agents for all other joint venturers, within the scope of the enterprise." *Burruss v. Green Auction & Realty Co.*, 228 Va. 6, 319 S.E.2d 725, 727 (Va. 1984); see also *Gramercy Equities Corp. v. Dumont*, 72 N.Y.2d 560, 565, 534 N.Y.S.2d 908, 911, 531 N.E.2d 629 (1988) ("As agents for each other, partners and joint venturers are jointly and severally liable to third parties for any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership.") (quotations omitted). The duration of that joint liability coincides with the duration of the joint venture; it begins when the joint venture begins, and ceases when that venture terminates.

Even if the Teaming Agreement makes CACI liable for the acts of its co-venturers, it does not do so retroactively. Yet Pentagen would have me hold CACI liable for allegedly tortious acts that occurred on August 13, 1990, two days before the Teaming Agreement was executed. That I cannot do. Pentagen does not plead any facts that would make it possible to infer that a joint venture existed between [*42] CACI and O'Brien at any time before the Teaming Agreement was executed.

Moreover, the doctrine that one venturer is liable for the torts of his partner applies only to torts committed within the scope of the co-venturer relationship. Burruss, 319 S.E.2d at 727. Here, O'Brien, BTI,

EOSD and CACI entered into the Teaming Agreement to market MENTIX to the AMC and other parties. As part of that agreement, O'Brien, BTI and EOSD warranted to CACI that they had good title to and possession of the relevant intellectual property. It would be unreasonable to conclude that any tortious and potentially criminal acts to obtain that title and possession were within the scope of the joint enterprise. Because there is no basis for imposing vicarious liability on CACI for the acts of O'Brien on August 13, 1990, Pentagen's claim for conversion based on the taking of its tangible property must be dismissed.

VII.

Although the claim appears nowhere in any of its three complaints, Pentagen asserts in its brief that CACI is liable to it for misappropriation of trade secrets. CACI misappropriated trade secrets, Pentagen alleges, by disclosing secret information about MENTIX to AMC, IBM, SBIS and others [*43] without Pentagen's consent. (Pl. Mem. at 51-52) The basis of this claim appears to be the confidentiality provision of the July 31, 1990 draft Teaming Agreement that was signed by CACI and delivered to Pentagen. However, Pentagen never signed that agreement, and as far as CACI was concerned, that draft was superseded by the revised agreement signed on August 15, 1990. See supra pp. 3-5.

The Virginia legislature has adopted the Uniform Trade Secrets Act, which makes tortious "disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain

its secrecy or limit its use." Va. Code § 59.1-336(2)(b)(2) (Michie 1992); see *Dionne v. Southeast Foam Converting & Packaging, Inc.*, 240 Va. 297, 397 S.E.2d 110, 114 (Va. 1990). The core of a claim for trade secret misappropriation is the secrecy of the disclosed information, and a duty on the part of the defendant, imposed contractually or by operation of law, to maintain that secrecy. *Avtec Sys., Inc. v. Peiffer*, 21 [*44] F.3d 568, 575 (4th Cir. 1994). In Virginia, an action for trade secret misappropriation must be brought within three years of discovery of the misappropriation. Va. Code. § 59.1-340.

The Copyright Act generally does not preempt claims for misappropriation of trade secrets, because those claims include the requisite extra element – breach of a duty of confidentiality. See, e.g., Avtec Sys., 21 F.3d at 574; Computer Assocs., 982 F.2d at 717; 1 Melville B. Nimmer et al., Nimmer on Copyright § 1.01[B][1][h] (1996). Accordingly, a claim for misappropriation of trade secrets could not be dismissed on the ground of preemption.

However, if a claim for misappropriation of trade secrets were asserted in Pentagen's complaint it would not survive a motion to dismiss pursuant to Fed. R. Civ. 12(b)(6) because Pentagen has not alleged any facts to support a finding that CACI owed Pentagen a duty of confidentiality. The document that Pentagen relies on – the draft Teaming Agreement – was never executed, and did not include Pentagen as a party. Thus, even assuming that the information disclosed qualifies as a "trade secret," Pentagen has not asserted any facts to support the [*45] claim that that information was disclosed improperly – i.e., that it was "misappropriated."

VIII.

Plaintiffs claims arising under New York Penal Code §§ 165 and 105.07 also must be dismissed. Section 165 of the Penal Code, entitled "Misapplication of property," Makes it illegal to (a) "loan, lease, pledge, pawn or otherwise encumber [borrowed] property without the consent of the owner in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss," and (b) to refuse, after receiving written demand or to return personal property worth more than $100. N.Y. Penal Law § 165.00(1) (McKinney 1988 & Supp. 1996). Section 165.07, entitled "Unlawful use of secret scientific material," makes it a felony to reproduce secret scientific material without permission to do so. *Id.* § 165.07.

Neither statute expressly authorizes a private party to enforce the statute's provisions or recover damages for its violation. Accordingly, as with the Major Fraud Act, supra pp. 23-24, it is necessary to determine whether a private right of action may properly be inferred from the text of either statute. There is no indication in the text of [*46] either provision of the Penal Law that the New York legislature intended to permit private enforcement. Nor is there anything in New York's scheme of criminal law enforcement to suggest that such enforcement would be aided by a private action under these two provisions. They are "just ... bare criminal statute[s]." *Casey Sys., Inc. v. Firecom, Inc.*, No. 1995 U.S. Dist. LEXIS 17761, 94 Civ. 9327, 1995 WL 704964 *3-4 (S.D.N.Y. Nov. 29, 1995) (holdi*g that §§ 156.00 and 165.00 of the New York Penal Law do not support a private right of action). Plaintiffs only response to this argument is: "If the court finds that there is no civil remedy, it should refer the matter to the appro-

priate authorities for proper action." (Pl. Mem. at 63, 64) That is not my job. Because I do find that there is no civil remedy, Pentagen's claims arising under the Penal Law must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

IX.

Pentagen's claims pursuant to § 2C: 20-3 and § 2C: 20-23 of the Virginia Criminal Code also must be dismissed. Pentagen states conclusorily in its complaint that CACI has violated those statutes through its "theft of intellectual property" [*47] and its "theft of computer software," respectively. But Pentagen has not provided a more specific citation to those alleged statutes, their text, or any cases applying them. Indeed, Pentagen makes no mention of those claims in either of its briefs submitted on the pending motions. Judge Brinkema noted that Pentagen's claims appear to be based on fictitious provisions (Def. Mem. Ex. 2 at 6-7), and my own research has not illuminated the legal basis of Pentagen's claims. Because plaintiff's claims are based on phantom provisions of the Virginia Criminal Code, those claims must be dismissed.

I note here that because all of the claims against CACI International, CACI Systems, and CACI-Federal are dismissed on the ground of res judicata or failure to state a claim upon which relief can be granted, it is unnecessary to address CACI's challenge to personal jurisdiction. Although that approach may seem to reverse the usual order of things, it is more sensible and more efficient to resolve Pentagen's claims on the merits than to resolve them on jurisdictional grounds because of the proliferation of litigation surrounding the same series of events

here. A bare dismissal on jurisdictional grounds [*48] (if that would be the outcome of the analysis), or a dismissal accompanied by a transfer to the Eastern District of Virginia, unnecessarily would delay getting to the bottom of this case. I express no view as to whether a New York court may assert personal jurisdiction over the CACI entities as a result of the MENTIX transactions.

X.

CACI argues that the judgment of the Virginia Court bars Pentagen's claims against the individual defendant, Dr. Jack London. Because London was not a named party in the Virginia action, whether Pentagen's claims against him are barred by the Virginia judgment turns on the doctrine of privity.

An officer, director or shareholder of a corporation is in privity with that corporation, and barred from asserting claims on his own behalf, if he participated in and controlled the earlier litigation on behalf of the corporation. *Teltronics Servs., Inc. v. Hessen*, 762 F.2d 185, 191 (2d Cir. 1985). Although generally sufficient, control over the prior litigation "is not a necessary element of privity." *Marine Midland Bank v. Slyman*, 995 F.2d 362, 365 (2d Cir. 1993) (citation omitted). Privity exists as long as the parties have an "identity [*49] of interest through succession to the same property rights involved in the prior litigation," *Id.* (citation omitted), and if the interests of the non-party are represented by a party who is "vested with the authority of representation." *Alpert's Newspaper Delivery Inc. v. New York Times Co.*, 876 F.2d 266, 270 (2d Cir. 1989).

The Second Circuit has held that persons who are officers, directors, sole shareholders and guarantors

of a corporation had interests sufficiently equivalent to those of the corporation to establish privity with the corporation for preclusion purposes. *Id.* The Second Circuit has held also that nonparty shareholders of a corporation are precluded from later litigation when a judgment was entered after vigorous litigation on the same cause of action by the corporation itself. Amalgamated Sugar, 825 F.2d at 640.

CACI argues that London is in privity with it because he is the chairman and president of CACI, had the same interests in the Virginia litigation as did CACI, and therefore can benefit from the res judicata effect of the Virginia action to the same extent as can CACI. I agree. A corporation is an artificial entity that can act only through [*50] its agents. See, e.g., *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983) (holding that a corporation cannot litigate pro se). Here, London is the human representative of CACI and as such, he shared its interests in success in the Virginia action.

Pentagen argues that even if London is in privity with CACI, the present claims against him are not barred for the same reason that the claims not litigated against CACI are not barred: because CACI split its cause of action, and in essence, agreed to litigate London's liability separately when it failed to ask the Virginia Court for a declaration that London had done no wrong. But CACI's conduct in the Virginia action on the claims against London differs in one material respect from its conduct in that litigation on the claims against the corporate entities: when CACI initiated the Virginia action, Pentagen had not yet asserted any claims against London individually. Indeed, Pentagen did not assert those claims until after the Virginia Court's decision. The

prohibition on claim splitting does not require a party to anticipate claims that might be brought against its privies. Here, the concept of claim splitting [*51] more accurately describes Pentagen's conduct relating to London than it does CACI's. Accordingly, because London is in privity with CACI, and because the claims against him arise from the same series of events – those surrounding the execution of the Teaming Agreement and the marketing of MENTIX to AMC – those claims are barred by res judicata.

XI.

Pentagen's claims against London would be dismissed even if they were not barred by claim preclusion. Although London moved originally to dismiss the claims against him for lack of personal jurisdiction (Def. Mem. at 23-26), he now concedes that there is personal jurisdiction because he was personally served in New York, and withdraws his Rule 12(b)(2) motion to dismiss. (Def. Reply Mem. at 12)

As a threshold matter it is necessary to determine whether Pentagen's three claims against London are governed by the law of New York or that of Virginia. Pentagen argues for the former, on the ground that London's alleged tortious conduct occurred in New York; London argues for the latter, on the ground that the alleged tortious conduct occurred in Virginia. As stated above, see supra at 26, I must apply New York choice-of-law principles [*52] to determine which state's substantive laws govern Pentagen's claims. Again, the parties' domiciles and the locus of the tort are the most meaningful factors.

The parties' domiciles are undisputed: Pentagen is a British corporation that maintains a New York office, and London is a Virginia resident. The "locus of

the tort" is more controversial. Pentagen contends that London's letters, written from his office in Virginia, to Baird and Pentagen in New York, in Fall 1991 and Winter 1992 contained fraudulent representations, or at a minimum, negligent misstatements. Pentagen contends that because this "tortious conduct was committed in New York against a New York corporation so that Pentagen's Intellectual Property could be transferred to another New York corporation, I.B.M.," New York law should apply.

Misstatements are deemed to occur in the jurisdiction where they were transmitted, rather than the jurisdiction in which they were received. *Purcell Graham, Inc. v. National Bank of Detroit*, 1994 U.S. Dist. LEXIS 15196, No. 93 Civ. 8786, 1994 WL 584550 (S.D.N.Y. Oct. 24, 1994). Consistent with that proposition, several courts have held that when an allegedly fraudulent misstatement is made in one state and [*53] relied on in another, the law of the state of transmission controls because of that state's strong interest in deterring and punishing the fraud of its residents. *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1075 (S.D.N.Y. 1992), aff'd, 990 F.2d 71 (2d Cir. 1993); *ACLI Int'l Commodity Servs., Inc. v. Banque Populaire Suisse*, 652 F. Supp. 1289, 1299 (S.D.N.Y. 1987). Accordingly, because London's alleged misstatements were made in Virginia, Virginia law governs Pentagen's state claims against him.

Pentagen's claims of negligent misstatement and fraudulent misrepresentation fail to state a claim upon which relief may be granted under Virginia law. CACI argues that the claims are preempted by the Copyright Act and barred by the applicable statutes of limitations. However, there is no need to address either of those defenses because the claims must be

dismissed for a much simpler reason: both claims are facially insufficient because Pentagen admits that the London statement in question was true. Under Virginia law, a representation is actionable only when that representation is false, and when its speaker knew that it was false and intended the recipient to rely thereon. [*54] See, e.g., *City of Richmond v. Madison Mgt. Group, Inc.*, 918 F.2d 438, 447 (4th Cir. 1990) (applying Virginia law). [15] Here, Pentagen admits in its complaint that "the factual content of Dr. London's statement was literally true." (London Compl. P 28) That admission fatally undercuts any claim of misrepresentation – negligent, fraudulent, or otherwise – and requires dismissal of Pentagen's first two claims against London.

XII.

In its brief, Pentagen recharacterizes its claim against London as one for promissory estoppel. Pentagen states that in a telephone call with Baird on September 27, 1991 London, speaking of CACI, stated that "we deal with all the cards on the table." Pentagen now cries foul play – asserting that it relied on that promise, that London broke that promise, and that and Pentagen was injured thereby. (Pl. [*55] Mem. at 81-82 and Ex. 12)

This claim suffers from numerous defects. First, it is mentioned nowhere in the complaint and therefore is not properly considered here. But even if the inclusion of the claim in plaintiff's brief were treated as a motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a), that motion would be denied because

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[15] The same is true under New York law. *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir. 1995) (applying New York law).

plaintiff's claim would not survive a Motion to dismiss pursuant to Rule 12(b)(6), and therefore is futile. *Forman v. Davis*, 371 U.S. 178, 181, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).

Under Virginia law, plaintiff's claim of promissory estoppel would be barred because Virginia courts have not adopted the doctrine of promissory estoppel. *Stone Printing & Mfg. Co. v. Dogan*, 234 Va. 163, 360 S.E.2d 210, 212 (Va. 1987); *Nguyen v. CNA Corp.*, 44 F.3d 234, 241 (4th Cir. 1995).

Even if Virginia law recognized a claim based on the theory of promissory estoppel, or if New York law applied, the claim would be dismissed for its patent insufficiency. Under New York law, a claim of promissory estoppel requires proof of: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the promisee, and (3) injury to the promisee. [*56] *P.A. Bergner & Co. v. Martinez*, 823 F. Supp. 151, 160 (S.D.N.Y. 1993); Restatement (Second) of Contracts § 90(1) (1981). A "promise" is defined as:

> an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to a promisee that he may justly expect performance and may reasonably rely thereon.

1 Corbin on Contracts § 13 (1963).

London's descriptive statement of CACI's business practices – "we deal with all the cards on the table" – is more a puff than a promise, let alone a clear and unambiguous promise that could trigger reasonable reliance. London said nothing specific about what CACI would do in the future; he made only a general statement about his company's usual course of con-

duct. Accordingly, any claim based on the doctrine of promissory estoppel must be dismissed because of the absence of the most basic element of that claim – a sufficient promise.

XIII.

Finally, Pentagen charges London with breach of fiduciary duty. (London Compl. PP 45-52) Pentagen contends that pursuant to the August 1993 settlement in the RDG action, CACI became a "constructive [*57] trustee" for Pentagen as to the MENTIX software, and that London, as Chairman, CEO and director of CACI "owed a fiduciary duty to plaintiff with regard to plaintiff's interest in MENTIX." (*Id.* PP 46-47) Pentagen contends further that London breached this duty by making false and negligent statements, and that Pentagen was injured as a result. (*Id.* PP 48-52)

This claim suffers from a fatal chronological flaw. Even assuming that the RDG settlement imposed on London a fiduciary duty to Pentagen, that duty could not be breached prior to its creation. There is no basis for concluding that that duty would govern London's behavior retroactively. Because Pentagen's complaint asserts that the duty was created in August 1993 and breached in Fall 1991, that claim may not proceed.

♦——♦——♦

For all of the reasons stated above, the defendants' motion to dismiss is granted and the complaints are dismissed. Because Pentagen has had and taken ample opportunity to state its claims, and because even claims not articulated in Pentagen's complaints have been treated here, leave to amend is denied.

SO ORDERED:

Dated: New York, New York

August 1, 1996

Michael B. Mukasey,

U.S. District Judge [*58]

b. Order Granting Motion For Reconsideration Entered By Judge Mukasey Dated August 1, 1996

PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., Plaintiff, –against– CACI INTERNATIONAL INC., CACI SYSTEMS INTERNATIONAL, INC., CACI, INC.-FEDERAL, Defendants. PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., Plaintiff, –against– CACI INTERNATIONAL INC., CACI SYSTEMS INTERNATIONAL, INC., CACI, INC.-FEDERAL and THOMAS M. MARSHALL, Defendants. PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., Plaintiff, –against– J.P. LONDON, Defendant.

93 Civ. 8512 (MBM), 94 Civ. 0441 (MBM), 94 Civ. 8164 (MBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 10907

August 1, 1996, Decided

August 2, 1996, FILED

PRIOR HISTORY: [*1] Original Opinion of July 15, 1996, Reported at: 1996 U.S. Dist. LEXIS 9903.

Adopting Magistrate's Document of September 20, 1995, Reported at: 1995 U.S. Dist. LEXIS 21147.

DISPOSITION: Plaintiff's motion for reconsideration granted.

COUNSEL: APPEARANCES:

JOEL Z. ROBINSON, ESQ., Law Offices of Joel Z. Robinson and Co., (Attorney for Plaintiff), New York, NY.

JAMES M. DAVIS, ESQ., Owen & Davis, (Attorney for Defendants), New York, NY.

J. WILLIAM KOEGEL, JR., ESQ., Steptoe & Johnson, (Attorney for Defendants), Washington, D.C.

JUDGES: Michael B. Mukasey, U.S. District Judge

OPINION BY: Michael B. Mukasey

OPINION: OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

On July 15, 1996, I granted summary judgment for defendants in the above-captioned cases. Plaintiff now moves for reconsideration of that decision pursuant to Local Rule 3(j). For the reasons that follow, plaintiff's motion is granted and, on reconsideration, the initial decision herein is adhered to.

First, plaintiff draws my attention to a clerical and utterly insignificant error in the July 15 opinion: In discussing a letter sent by CACI's Director of Contracts, Raymond L. Rollins, to RDG's President, Robert O'Brien, I stated incorrectly that that letter was dated September 27, 1991. In fact, that letter was dated September 27, [*2] 1990. That error has been corrected in an Amended Opinion and Order issued today.

Next, plaintiff argues that correction of that error compels a different outcome on plaintiff's claim for misappropriation of trade secrets. Plaintiff conjectures that dismissal of that claim hinged on a finding

that Rollins' letter was sent to O'Brien in September 1991 rather than September 1990. Plaintiff is incorrect.

A claim for misappropriation of trade secrets under Virginia law requires proof that the defendant:

> at the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

Va. Code § 59.1-336(2)(b)(2) (Michie 1992). Central to a claim of trade secret misappropriation is a duty of confidentiality. *Avtec Sys. Inc. v. Peiffer*, 21 F.3d 568, 575 (4th Cir. 1994).

Plaintiff's claim for misappropriation of trade secrets was and still is insufficient because CACI did not acquire the information about MENTIX under circumstances giving rise to a duty not to disclose that information to potential third-party buyers such as AMC. In reaching [*3] that conclusion, I was aware that CACI was on notice of a potential title dispute to MENTIX before it marketed MENTIX to AMC. (Opinion at 5) Plaintiff itself recognizes that there is other evidence demonstrating that CACI was aware of a potential title dispute before it marketed MENTIX to AMC. (Pl. Mem. at 9-10)

But the parties to the Teaming Agreement – O'Brien, BTI, and EOSD – all warranted to CACI that they had good title to MENTIX. Moreover, CACI investigated the alleged title dispute and disclosed MENTIX after receiving written confirmation that its Teaming Agreement partners had the authority to do what they contracted to do. CACI had no other obligation

to Pentagen. Because those circumstances do not give rise to a duty to maintain the secrecy of MENTIX, CACI did not "misappropriate" Pentagen's trade secrets.

♦——♦——♦

Because the corrected factual error does not alter the legal analysis, the initial decision on this motion is adhered to.

SO ORDERED:

Michael B. Mukasey

U.S. District Judge

Dated: New York, New York

August 1, 1996

APPENDIX B

NEW YORK CONVERSION ACTION v. RUNAWAY

1. RUNAWAY ACTION JUDGMENT ENTERED AUGUST 2, 1993 BY JUDGE SPRIZZO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X	
Runaway Development Group, S.A.	: 91 Civ. 5643(JES)
Plaintiff,	:
	: STIPULATION
–against–	: AND ORDERS
	: FOR
	: AMENDMENT
	: OF
Pentagen Technologies	: PLEADINGS
International Limited,	: AND
John C. Baird and	: JUDGMENTS
Mitchell R. Leiser	:
Defendants	: ACTION NO. 1
----------X	
Pentagen Technologies	: USDC, SDNY
International Limited,	:
John C. Baird and	: Court Stamp
Mitchell R. Leiser	: August 4, 1993
Counterclaim Plaintiff	:
–against–	: ACTION No. 2
Runaway Development	:
Group, S.A., Expert Objective	:
Systems Development	:
Corporation, and	:
Robert A. O'Brien	:

Counterclaim Defendants	:	
----------X		
Runaway Development	:	
Group, S.A., and Expert	:	
Objective Systems	:	
Development Corporation	:	
Counterclaim Plaintiff	:	
–against–	:	ACTION No. 3
Pentagen Technologies	:	
International Limited,	:	
John C. Baird and	:	
Mitchell R. Leiser	:	
Counterclaim Defendants	:	
----------X		

IT IS HEREBY STIPULATED AND AGREED that:

Joseph L. Spiegel, Esq. of Spiegel, Pergament & Brown be granted leave to appear as attorney of record for RUNAWAY DEVELOPMENT GROUP, S.A., ("RDG") EXPERT OBJECTIVE SYSTEMS DEVELOPMENT CORPORATION ("EOSD") and ROBERT A. O'BRIEN.

The annexed Affidavit For Judgment by Confession sworn to on July 22, 1993 by ROB, be filed in this action.

THAT ROB, RDG, and EOSD consent to the entry of an order in the actions in this court as follows:

IT IS ORDERED that

a) Action No. 1, the main action by RDG against Pentagen Technologies International Limited ("PTI"), John C. Baird ("JCB") and Mitchell R. Leiser ("MRL"), is dismissed as to all claims

with: prejudice and without costs or attorneys' fees;

b) Action No. 3, counterclaims by RDG and EOSD against PTI, JCB and MRL, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

c) Action No. 2, counterclaims by PTI against ROB, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

d) Action No 2, counterclaims, judgment in the amount of ONE MILLION, SEVEN HUNDRED THOUSAND DOLLARS ($1,700,000.00) shalt be granted in favor of PTI and against RDG on the FIRST through TENTH counterclaims and against EOSD on the SECOND and FOURTH counterclaims and against RDG and EOSD jointly and severally, said counterclaims being set forth with more particularity in a pleading dated February 3, 1992 and RDG and EOSD admit the allegations of such counterclaims;

e) The relief demanded by the defendants against each of RDG, and EOSD in relation to each and ever cause against them and either of them, be granted in each and every respect; and

f) All the Intellectual Property in ROB's possession including but not limited to, the copies of the documentation and source code on diskettes and all other items relating thereto returned to EOSD on January 20, 1992, be delivered to PTI at the offices of its counsel no later than seven (7) days from the date of the entry of this Order;

Dated: New York, New York
July 28 1993
Law Offices of Joel Z. Robinson & Co.

by: s/Joel Z. Robinson
Joel Z. Robinson (JZR 9082)
Attorneys for the Defendants
110 Wall Street
New York, New York 10005
(212) 344-2040

Spiegel, Pergament & Brown
By: s/Joseph L. Spiegel
Joseph L. Spiegel (JLS-7110)
Attorneys for Plaintiff and
Counter-claim Defendants
272 Mill Street,
P.O. Box 831
Poughkeepsie, NY 12602
(914) 452-7400

SO ORDERED 8/2/93

s/Peter K. Leisure
for John E. Sprizzo
John E. Sprizzo
United States District Judge

◆——◆——◆

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Runaway Development	: 91 Civ. 5643 (JES)
Group, S.A.	:
Plaintiff,	: AFFIDAVIT
–against–	: FOR JUDGMENT
	: BY CONFESSION
Pentagen Technologies	:
International Limited,	:
John C. Baird and	:

Mitchell R. Leiser	: ACTION No. 1
Defendants	:
----------X	
Pentagen Technologies	:
International Limited,	:
John C. Baird and	:
Mitchell R. Leiser	:
Counterclaim Plaintiff	:
–against–	: ACTION No. 2
Runaway Development	:
Group, S.A., Expert Objective:	
Systems Development	:
Corporation, and	:
Robert A. O'Brien	:
Counterclaim Defendants	:
----------X	
Runaway Development	:
Group, S.A., and Expert	:
Objective Systems	:
Development Corporation	:
Counterclaim Plaintiff	:
–against–	: ACTION No. 3
Pentagen Technologies	:
International Limited,	:
John C. Baird and	:
Mitchell R. Leiser	:
Counterclaim Defendants	:
----------X	

STATE OF)
)
COUNTY OF)

ROBERT O'BRIEN being duly sworn, deposes and says:

1. THAT he Robert O'Brien ("ROB") is the Chairman of the Board, President, and shareholder of RUNAWAY DEVELOPMENT GROUP S.A., ("RDG") the Plaintiff, one of the counterclaim defendants and counterclaim plaintiff in the abovementioned action and EXPERT OBJECTIVE SYSTEMS DEVELOPMENT CORPORATION ("EOSD") one of the counterclaim defendants in the above entitled action.
2. THAT RDG is incorporated in Panama with offices in the Bahamas, EOSD is a Delaware Corporation and has its place of business in the Commonwealth of Virginia and ROB resides in Arlington, Virginia. ROB, RDG and EOSD designate the court in which this action is pending as the court in which the judgment consented to herein may be entered.
3. THAT ROB, RDG, and EOSD consent to the entry of an order in the actions in this court as follows: "IT IS ORDERED that
   a) Action No. 1, the main action by RDG against Pentagen Technologies International Limited ("PTI"), John C. Baird ("JCB") and Mitchell R. Leiser ("MRL"), is dismissed as to all claims with: prejudice and without costs or attorneys' fees;
   b) Action No. 3, counterclaims by RDG and EOSD against PTI, JCB and MRL, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

c) Action No. 2, counterclaims by PTI against ROB, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

d) Action No 2, counterclaims, judgment in the amount of ONE MILLION, SEVEN HUNDRED THOUSAND DOLLARS ($1,700,000.00) shalt be granted in favor of PTI and against RDG on the FIRST through TENTH counterclaims and against EOSD on the SECOND and FOURTH counterclaims and against RDG and EOSD jointly and severally, said counterclaims being set forth with more particularity in a pleading dated February 3, 1992 and RDG and EOSD admit the allegations of such counterclaims;

e) The relief demanded by the defendants against each of RDG, and EOSD in relation to each and ever cause against them and either of them, be granted in each and every respect; and

f) All the Intellectual Property including but not limited to, the copies of the documentation and source code on diskettes and all other items relating thereto returned to EOSD on January 20, 1992, be delivered to PTI at the offices of its counsel no later than seven (7) days from the date of the entry of this Order;

THAT each of RDG, EOSD and ROB hereby authorize PTI its successors, or assigns to enter judgment in the form as set out above.

THAT this action has been actively litigated since August 9, 1991 and the facts of the case are fully set out n the extensive pleadings filed therein which are incorporated herein by reference,

THAT each of RDG, EOSD, and ROB have conferred with Joseph L. Spiegel Esq of Spiegel, Pergament & Brown regarding this confession and are fully aware of the implications of this settlement.

THAT ROB represents and warrants that all necessary corporate action has or will be taken to ensure that the judgment contained herein against RDG and EOSD is fully binding upon each of them.

THAT in addition to the entry of the judgment, and in partial satisfaction of the judgment so entered, ROB, RDG, and EOSD, jointly and severally undertake to do the following:

a) return and transfer to Pentagen Technologies International Limited ("PTI") all right title and interest in any outstanding shares held by the plaintiffs in PTI;

b) all parties shall release one another from any and all debt, dues, sums of money, accounts, reckoning, bonds, bills specialties, contracts, controversies agreements, promises, variances, trespasses damages, judgments extents, executions claims and demands whatsoever in law, admiralty, or equity that is presently outstanding to any or all of the plaintiffs, whether secured or unsecured or of any nature, and to return to PTI any interest securing any indebtedness except as contained in this Affidavit for Judgment by Confession and as noted in paragraph 3D above;

c) in addition to the obligations contained in the judgment above, to transfer to PTI all right, title, and interest which either ROB, RDG, or EOSD has or any person holding any interest on their behalf or through them, to any addi-

tions improvements enhancements, and source code relating to the intellectual property the subject of this action, together with any patent applications made in relation thereto;

d) resign from any position either as officer, director employee or independent contractor of PTI;

e) deliver to PTI, at the offices of its counsel within seven days of the date of the signing of this affidavit, the Toshiba laptop Model 5100 containing the intellectual property, and further represents and warrants that he holds and has no interest in any other intellectual property owned by PTI;

g) (intentionally left blank)

f) ROB, EOSD and RDG each confirm that none of them have any interest of whatever nature in Baird Technologies Inc. ("BTI"); and undertake to sign, enter into, execute, and deliver, in all of their names, forthwith, the attached letters and any contract, agreement, conveyance, and any other instrument as may be necessary to perform any of the undertakings contained in this affidavit or the judgment.

SWORN to at)
Palm Beach County, Florida) s/Robert A O'Brien
this July 22 1993) ROBERT A O'BRIEN
BEFORE me:

s/Kathryn A. Pierce
Notary Public
[Seal]

♦——♦——♦

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Runaway Development Group, S.A.	:91 Civ. 5643 (JES)
Plaintiff,	: SECOND AMENDED
–against–	: ANSWER
	:
Pentagen Technologies International Limited, John C. Baird and Mitchell R. Leiser	: PLAINTIFF DEMAND : TRIAL BY JURY
Defendants	:
Pentagen Technologies International Limited, John C. Baird and Mitchell R. Leiser	:
Counterclaim Plaintiff	:
–against–	:
Runaway Development Group, S.A., Expert Objective Systems Development Corporation, and Robert A. O'Brien	:
Counterclaim Defendants	:

COUNTERCLAIMS

Counterclaim Plaintiff Pentagen Technologies International Limited, by its attorneys, Law Offices Joel Z. Robinson, alleges the following as its Amended Counterclaims:

♦——♦——♦

WHEREFORE, Defendants demand judgment:

a) Dismissing the Complaint;

b) On its First Counterclaim declaring that RDG does not possess a security interest in the Intellectual Property or in its Patent Applications, that the Assignment is null and void, that PTI has title to the Intellectual Property and the Patent Applications and the right to use such property, and enjoining RDG and EOSD, its successors, assignees, and nominees from claiming ownership or using in any way the Intellectual Property or patent Applications;

c) On its Second Counterclaim for the imposition of a constructive trust as to the Intellectual Property and proceeds of any sale of the Intellectual Property and directing that RDG and ESOD, their successors, assignees and nominees account for all income derived from the Intellectual Property;

d) On its Third Counterclaim against RDG and O'Brien for an order directing that RDG withdraw the Assignment, for imposition of a constructive trust as to the Intellectual Property, and directing that RDG, its successors, assignees and nominees account for income derived from the Intellectual Property and for damages in an amount to be determined at trial not less then $1.5M together with interest from July 24, 1990.;

e) On its Fourth Counterclaim for an injunction preventing RDG, its successors, assignees and

nominees for utilizing in any way the Intellectual Property;

f) On its Fifth, Sixth, Seventh, Eighth, and Ninth Counterclaims for damages in an amount to be determined at trial not less than $2.5M, together with interest from July 24, 1990;

g) On its Tenth Counterclaim, for damages in an amount to be determined at trial not less than $50,000 together with interest from August 13, 1990;

h) On all its causes of action for its costs and for such other and further relief as this court deems necessary and appropriate.

Dated: New York, New York
February 3, 1992

Law Offices Joel Z. Robinson
Attorneys for Defendants and
Counterclaim Plaintiff
By: s/Joel Z. Robinson (am)
Joel Z. Robinson (JZR:9802)
110 Wall Street
New York, New York 10005-3801
(212) 344-2040 (tel)
(212) 344-2070 (fax)

baird3/pent/2dans

◆——◆——◆

TO:
U.S. Army
Material Command
Washington, D.C.

TO:
CACI, Inc - Federal

1100 North Glebe Road
Arlington, Virginia, 22201
AND TO: Any Other Interested Parties
RE: Acknowledgment of Title

Runaway Development Group, S.A. Expert Objective Systems Development Corp., and Robert A. O'Brien (hereinafter the "Group") hereby acknowledge and confirm that:

(1) no member of the Group has, or claims, title to the technology known as MENTIX and used in the MENTIX-MVS product, subject only to the security interest of Runaway Development Group in such technology;

(2) insofar as the Group is concerned, Pentagen Technologies International Limited ("PTI") owns the MENTIX technology and MENTIX-MVS product; and

(3) any license by PTI of the MENTIX technology will not violate any rights of the Group.

Dated: February 12, 1992

Runaway Development Group, S.A.
By: s/Robert A. O'Brien
Expert Objective Systems Development Corp.
By: s/Robert A. O'Brien Pres.
s/Robert A. O'Brien
Robert A. O'Brien

♦——♦——♦

2. JUDGE SPRIZZO'S ORDERS OCTOBER 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

RUNAWAY DEVELOPMENT :
GROUP, S,A., :

Plaintiff(s),	:	
– against –	:	91 Civ. 5643 (JES)
PENTAGEN TECHNOLOGIES	:	
INTERNATIONAL LIMITED,	:	
MEMORANDUM	:	
ET AL. OPINION AND	:	
	:	ORDER
Defendant	:	
----------	x	

SPRIZZO, D.J.:

The present controversy involves the question of whether judgment creditor Pentagen Technologies International Ltd. ("Pentagen" or "creditor") may obtain by motion in the above-captioned action an Order of Turnover for computer software allegedly in the possession of third-party transferee United States of America ("Government" or "transferee") pursuant to Article 52 of the New York Civil Practice Law and Rules. Because this motion is the improper vehicle for seeking this relief, and because Pentagen is barred, for a variety of reasons, from seeking this relief from the Government, this Court denies Pentagen's motion.

BACKGROUND

This action, which was commenced in 1991, involved a dispute about the ownership of the MENTIX software program. That dispute was settled by a 1993 Stipulation and Order in which plaintiff Runaway Development Group, S.A. and its affiliates consented to entry of judgment against them and agreed to deliver to Pentagen all copies of MENTIX and its documentation. See Stipulation and Orders for

Amendment of Pleadings and Judgments, dated Aug. 2, 1993.

Emboldened by its success in this action, Pentagen proceeded to bring a number of suits against, *inter alios*, CACI International, Inc. ("CACI"), Pentagen's former business associate, alleging copyright infringement, conversion, and violations of the False Claims Act, *see, e.g.*, *United States ex rel. Pentagen Techs. Int'l, Ltd. v. CACI Int'l Inc.*, No. 96-7827, 1997 U.S. Dist. LEXIS 12244, 1997 WL 473549 (S.D.N.Y. Aug. 18, 1997); *Pentagen Techs. Int'l, Ltd. v. CACI Int'l Inc.*, Nos. 93-8512, 94-441, 94-8164, 1996 U.S. Dist. LEXIS 9903, 1996 WL 435157, at *1-7 (S.D.N.Y. Aug. 2, 1996); *United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.*, No. 942925, 1995 U.S. Dist. LEXIS 17512, 1996 WL 11299 (S.D.N.Y. Jan. 4, 1996); *CACI Int'l Inc. v. Pentagen Techs. Int'l, Ltd.*, No. 93-1631-A, 1994 WL 1752376, 1994 U.S. Dist. LEXIS 21457, at *1-11 (E.D. Va. June 16, 1994), and the Government, alleging abuse of process, conversion, and copyright infringement, *see, e.g.*, *Pentagen Techs. Int'l Ltd. v. United States*, 175 F.3d 1003 (Fed. Cir. 1999); *Pentagen Techs. Int'l Ltd. v. United States*, No. 01-3078, 2002 WL 465308, 2002 U.S. Dist. LEXIS 5030 (S.D.N.Y. Mar. 26, 2002); *Pentagen Techs. Int'l Ltd. v. United States*, 103 F. Supp. 2d 232 (S.D.N.Y. 2000). Despite bringing "a seemingly endless series of lawsuits," *Pentagen*, No. 01-3078, 2002 U.S. Dist. LEXIS 5030, at *4, before no less than seven federal judges, Pentagen failed in each of its attempts to show that CACI or the Government infringed or converted the MENTIX software. See, e.g., *Id.* at *4-8; *Pentagen Techs. Int'l Ltd. v. United States*, 172 F. Supp. 2d 464, 468-70 (S.D.N.Y. 2001). Finally, by Memorandum Opinion and Order dated November 5,

2001, this Court, faced with Pentagen's "vexatious litigation strategy and needless occupation of judicial resources," enjoined Pentagen from filing further litigation without permission of the Court. Pentagen, 172 F. Supp. 2d at 474.

Faced with an inability to bring another suit, and armed with allegedly new evidence that purports to show that the Government received an alternative version of MENTIX which it has failed to return, *see* Mem. in Supp. at 2-9, Pentagen breathed new life into this action by filing a motion, dated April 29, 2005, in which it seeks to force the Government to return "all versions of software known as MENTIX in the possession of the United States," *Id.* at 1. The Government submitted a response dated June 7, 2005, and the Court heard Oral Argument on creditor's Motion on July 18, 2005.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 69(a) "[t]he [*2] procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held." Fed. R. Civ. P. 69(a). Article 52 of the New York Civil Practice Law and Rules governs the enforcement of judgments in New York, and therefore is applicable here. *See* N.Y. C.P.L.R. art. 52; *Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.*, 190 F.3d 16, 20, 21 n.4 (2d Cir. 1999).

Section 5225 sets forth the procedures for the return of property. Under section 5225(a), a judgment creditor can seek turnover of property held by the judgment debtor "[u]pon motion" in the original ac-

tion. N.Y. C.P.L.R. 5225(a). However, when the property sought is in the possession of someone other than the judgment debtor, the judgment creditor must follow the procedure set forth in section 5225(b), which requires that the creditor "commence an action against the person in possession," *Alliance Bond Fund, Inc.*, 190 F.3d at 21, instead of merely filing a motion in the original action, see N.Y. C.P.L.R. 5225(b); David D. Siegel, Practice Commentaries, N.Y. C.P.L.R. 5225, at 264-65 (McKinney 1997) (explaining that subsection (b) requires a special proceeding "bearing its own caption").

In this case, the Government contends that "Pentagen cannot proceed by mere motion against the Government to enforce its judgment against Runaway" and therefore "Pentagen's motion should be denied." Mem. in Opp'n at 15.

This Court agrees. Pentagen now seeks the turnover of the MENTIX software from the Government, a non-party to this action. Because Rule 69(a) of the Federal Rules of Civil Procedure dictates that state procedures be followed, and because section 5225(b) is applicable to this situation, Pentagen is required to commence a new action against the Government in order to attain the sought-after relief. Therefore the present motion is an improper vehicle for seeking this relief and must be denied.

In addition to this procedural defect, the Government asserts [*3] that a number of additional bars preclude the relief that Pentagen seeks. The Government argues that any suit based on this subject matter would be barred by sovereign immunity and by the doctrines of claim and issue preclusion.

Under the doctrine of sovereign immunity, the "United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The United States has consented to suit pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, which provides for "final agency actions to be reviewed by federal courts if there is a claim `that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority,' and the relief sought is other than money damages," *U.S. Envtl. Prot. Agency v. Gen. Elec. Co.*, 197 F.3d 592, 598 (2d Cir. 1999) (quoting 5 U.S.C. § 702).[16]

Here, Pentagen asserts that the Government's failure to turn-over MENTIX is final agency action. See Mem. in Supp. at 16; Tr., dated July 18, 2005, at 5.

That argument is dubious at best. In order to be deemed final agency action, "`the action must mark the consummation of the agency's decision making process.'" *New York v. U.S. Envtl. Prot. Agency*, 350 F. Supp. 2d 429, 434 (S.D.N.Y. 2004) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Paradigmatic examples of final agency actions include agency rules and rulemaking procedures, see, e.g., *Id.* at 435 (collecting cases), as well as specific agency decisions, *see, e.g.*, 17 U.S.C. § 701(e). Here, unlike in the typical APA case, the Government's actions are not the result of its "decision making process," and they do not reflect a process whereby the Government had "a full opportunity to consider and correct its own mis-

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[16] Although the Government has consented to suit in a variety of other statutes, Pentagen has relied solely on the APA as the source of sovereign immunity waiver here. See Mem. in Supp. at 15-16.

takes," *Sec. & Exch. Comm'n ex rel. Glotzer v. Stewart*, 374 F.3d 184, 192 n.8 (2d Cir. 2004). Rather, the Government has failed to return MENTIX to Pentagen because, as it has repeatedly indicated,[* 4] it does not possess MENTIX and, if it once did, it currently has no knowledge as to the whereabouts of the software. See Mem. in Opp'n at 17; Tr. at 14-15; Mem. in Supp. of Mot. to Quash, dated Oct. 4, 2004 ("Mot. to Quash"), at 8; Mot. to Quash, Ex. A, Certification of Guri Glass, dated Apr. 19, 2004; Mot. to Quash, Ex. B, Resp. to Court Directed Interrog., dated June 10, 2004. The Government's failure to produce something that it does not have is simply not final agency action review-able under the APA.[17]

Pentagen's reliance on *Levitt v. Fed. Bureau of Investigation*, *70* F. Supp. 2d 346 (S.D.N.Y. 1999), is unpersuasive. In *Levitt*, the FBI acknowledged that it possessed a sculpture in which it had no ownership interest. *Id.* at 347. Despite the availability of an interpleader action to resolve the dispute, Judge Kaplan found that sovereign immunity had been waived under the APA, presumably after assuming that the FBI's failure to return the sculpture constituted final agency action. *Id.* at 348-50. Assuming arguendo that Levitt correctly stands for the proposition that the Government's failure to turnover property in its possession is final agency action, *see id.*; *see also Marshall Leasing, Inc. v. United States*, 893 F.2d 1096,

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[17] The Court notes that the proper way for creditor to get information regarding the Government's possession of MENTIX would be to make a request under the Freedom of Information Act, 5 U.S.C. § 552. Un-surprisingly, Pentagen has already availed itself of this tool. *See, e.g., Pentagen Techs. Int'l Ltd. v. United States*, No. 98-4831, 2000 WL 347165, 2000 U.S. Dist. LEXIS 4146 (S.D.N.Y. Mar. 31, 2000).

1098-1100 (9th Cir. 1990), that finding is simply not persuasive here because the Government has repeatedly indicated that it does not have MENTIX and that it has no knowledge as to its whereabouts. See supra.

Finally, assuming that Pentagen could bring this action against the Government, this suit would be barred by the doctrines of claim and issue preclusion. Claim preclusion operates to bar claims that arise from the same set of operative facts as a previous claim between the same parties which has been resolved by a final judgment on the merits. *See Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 87-90 (2d Cir. 1997); *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90-91 [*5] (2d Cir. 1997).

Here, Pentagen seeks relief that is identical to the relief that it sought against the Government in an action filed in 2001. *See Pentagen Techs. Int'l Ltd. v. United States*, No. 01-3078, 2002 WL 465308, 2002 U.S. Dist. LEXIS 5030, at *15-16 (S.D.N.Y. Mar. 26, 2002). Judge Stein, in dismissing that action, in part based on the preclusive effect of a judgment issued by the Court of Federal Claims, *see Pentagen Techs. Int'l Ltd. v. United States*, 175 F.3d 1003 (Fed. Cir. 1999), ruled that "any request for the physical return of the software used in the government's test arises from the same transaction, and Pentagen cannot raise the claim now after failing to do so in the Court of Federal Claims action," *Pentagen*, No. 01-3078, 2002 U.S. Dist. LEXIS 5030, at *16.

Issue preclusion operates to bar "the relitigation of issues actually litigated and decided in the prior proceeding, as long as that determination was essential to that judgment," *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d

Cir. 1995), and there was "a full and fair opportunity for litigation in the prior proceeding," *Levy v. Kosher Overseers Assoc. of Am., Inc.*, 104 F.3d 38, 41 (2d Cir. 1997). [18]

In this case, in order to successfully seek turnover of MENTIX from the Government, Pentagen would need to prove that "[its] rights to [MENTIX] are superior to those of the [Government]." N.Y. C.P.L.R. 5225(b). A number of courts have already passed upon this question, and each time have determined that Pentagen has no enforceable rights to MENTIX as against the Government or its purported transferor, CACI. For example, following a ruling that there was no evidence that CACI had engaged in copyright infringement, CACI Int'l Inc., 1994 U.S. Dist. LEXIS 21457, at *14, Judge Mukasey determined that [*6] Pentagen could not state a valid conversion claim against CACI, Pentagen, Nos. 93-8512, 94-441, 94-8164, 1996 WL 435157, at *14. Based on these earlier rulings, Judge Stein determined that Pentagen was barred from bringing a conversion claim against the Government "[b]ecause it has been decided that Pentagen has no claim for conversion or copyright infringement against CACI in relation to CACI's marketing of software to the government."

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[18] Cases applying the New York law of issue preclusion indicate that the Court should consider the availability of new evidence in determining whether there was a full and fair opportunity to litigate in the prior proceeding, *see, e.g., Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 734 (2d Cir. 2001), whereas cases applying federal law are seemingly silent as to this factor, *see, e.g., Mario Valente Collezioni, Ltd. v. AAK Ltd.*, No. 02-99, 2004 WL 724690, 2004 U.S. Dist. LEXIS 5049, at *9-11 (S.D.N.Y. Mar. 26, 2004). Regardless of the applicable law, as discussed infra Pentagen's "new" evidence does not call into question the fairness of the earlier proceedings.

Pentagen, No. 01-3078, 2002 U.S. Dist. LEXIS 5030, at *17-18.

In addition, Pentagen cannot avoid the issue preclusive effect of these determinations by claiming that there is new evidence that was not available in the prior proceedings. Pentagen's new evidence, the April 2000 deposition of Mr. Edgar F. Brasseur, *see* Mem. in Supp. at 2, has already been passed upon by two courts and has been deemed insufficient to overcome the previous rulings. *See* Pentagen, No. 01-3078, 2002 U.S. Dist. LEXIS 5030, at *18; *Pentagen*, 103 F. Supp. 2d at 238. Additional depositions taken by Pentagen are of a similar character and they do not call into question the fairness of the prior proceedings.

In sum, Pentagen's motion is improperly brought, barred by sovereign immunity, and precluded by a multitude of previous actions and rulings. Given the injunction issued against Pentagen, *Pentagen*, 172 F. Supp. 2d at 474, and the series of adverse rulings in this end related cases, it is this Court's hope that this is the final word in an affair that has become an obsession for some and a thorn in the side of the federal courts.

CONCLUSION

Based on the foregoing, Pentagen's Motion to Order Turnover shall be and hereby is denied.

Dated: New York, New York
October 31, 2005

/s/
John E. Sprizzo
United States District Judge

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3. JUDGE SPRIZZO'S ORDER JUNE 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RUNAWAY DEVELOPMENT	:
GROUP, S.A.,	:
Plaintiff(s),	:
-against -	: 91 Civ. 5643 (JES)
PENTAGEN TECHNOLOGIES	:
INTERNATIONAL LIMITED,	:

ET AL. SUMMARY ORDER :
Defendant(s). :
----------X

The above-captioned action having come before the Court, and judgment creditor Pentagen Technologies International Ltd. ("Pentagen" or "creditor") having submitted its Motion for Turnover, or, alternatively, requesting leave to commence a special proceeding for that purpose dated April 14, 2006, and third party transferee CACI, Inc. ("CACI" or "transferee") having submitted its response to creditor's motion dated May 15, 2006, and counsel to creditor and to CACI having appeared before the Court for Oral Argument on June 19, 2006, and the Court having considered all matters raised, and

WHEREAS by Order of the Court dated November 5, 2001, creditor was enjoined, pursuant to 28 U.S.C. § 1651, from filing any further litigation without permission of the Court, *Pentagen Techs. Int'l Ltd. v. United States*, 172 F. Supp. 2d 464, 474 (S.D.N.Y. 2001), and

WHEREAS pursuant to section 5225(b) of New York's Civil Practice Law and Rules, Pentagen, as a judgment creditor seeking property that is not in the possession of a judgment debtor, "must commence an action against the person in possession," *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 21 (2d Cir. 1999), instead of merely filing a motion in the original action, *Runaway Dev. Group, S.A. v. Pentagen Techs. Int'l Ltd.*, 396 F. Supp. 2d 471, 473 (S.D.N.Y. 2005); *see also* David D. Siegel, Practice Commentaries, N.Y. C.P.L.R. 5225, at 264-65 (McKinney 1997) (stating that section 5225(b) re-

quires a special proceeding "bearing its own caption"), and

WHEREAS creditor failed to bring a new action for turnover and instead filed a motion in an existing action, and

WHEREAS, in the event the Court allowed creditor to commence a new action, pursuant to section 213 of New York's Civil Practice Law and Rules, in actions where no statute of limitations is specified by law the applicable statute of limitations is six years, and

WHEREAS it has been determined that the twenty-year statute of limitations for enforcement of judgments only applies to "judgment debtors and not to transferees unnamed in the judgment," *Ren-Cris Litho, Inc. v. Vantage Graphics, Inc.*, 194 A.D.2d 302, 303, 598 N.Y.S.2d 945, 946 (1st Dep't 1993), and

WHEREAS creditor failed to bring such a proceeding within six years of the consent judgment dated August 2, 1993, in which CACI was an unnamed transferee, and

WHEREAS, even if creditor's proceeding were timely, section 5225(b) allows a special proceeding against a transferee of the property only where the judgment creditor has proven that it has superior rights to the property, see N.Y. C.P.L.R. 5225(b), and

WHEREAS creditor has repeatedly failed to establish that CACI is currently in possession of the MENTIX software or, in the event that CACI has the property, that its rights to MENTIX are superior to those of CACI, *see Runaway Dev. Group*, 396 F. Supp. 2d at 476, and

WHEREAS claim preclusion operates to bar claims that arise from the same set of operative facts

as a previous claim between the same parties which has been resolved by a final judgment on the merits, *see Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 87-90 (2d Cir. 1997), and

WHEREAS at issue in this case are the same set of underlying facts that were at issue in previous claims brought by Pentagen against CACI, *see Pentagen Techs. Int'l, Ltd. v. CACI Int'l, Inc.*, Nos. 93-8512, 94-441, 94-8164, 1996 U.S. Dist LEXIS 9903, at *26-27 (S.D.N.Y. July 15, 1996), and

WHEREAS the doctrine of issue preclusion prohibits "the relitigation of issues actually litigated and decided in [a] prior proceeding, as long as that determination was essential to that judgment," *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995), so long as there was "a full and fair opportunity for litigation in the prior proceeding," *Levy v. Kosher Overseers Assoc. of Am.*, 104 F.3d 38, 41 (2d Cir. 1997), and

WHEREAS the issue of whether creditor has enforceable legal rights to MENTIX as against CACI has been litigated unfavorably to Pentagen on numerous occasions, *see Pentagen Techs. Int'l, Ltd.*, 1996 U.S. Dist. LEXIS 9903, at *40-42; *see also Pentagen Techs. Int'l Ltd. v. United States*, No. 01-3078, 2002 U.S. Dist. LEXIS 5030, at *17-18 (S.D.N.Y. Mar. 26, 2002), and

WHEREAS cases applying the New York law of issue preclusion suggest that the availability of new evidence should be considered in determining whether there was a full and fair opportunity to litigate in the prior proceeding, *see Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 734 (2d Cir. 2001), and

WHEREAS Pentagen's purported new evidence, the April 2000 deposition of Mr. Edgar F. Brasseur, "has already been considered and found insufficient to allow Pentagen to 'escape the preclusive effect of prior judgments,'" *Pentagen Techs. Int'l Ltd. v. United States*, 63 Fed. Appx. 548, 550 (2d Cir. 2003) (quoting *Pentagen Techs. Int'l Ltd* 2002 U.S. Dist. LEXIS 5030, at "18); *see Runaway Dev. Group*, 396 F. Supp. 2d at 476, it is

ORDERED that Pentagen's Motion for Turnover shall be and hereby is denied; and it is further

ORDERED that this Court, pursuant to its power under the injunction entered against Pentagen on November 5, 2001, denies Pentagen's request for leave to commence a special proceeding.

Dated: New York, New York
June 30 , 2006

/s/
John E. Sprizzo
United States District Judge

APPENDIX C
EASTERN DISTRICT OF VIRGINIA DECISIONS

1. JUDGE BRINKEMA'S 1994 DECISION UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

CACI INTERNATIONAL INC. ET AL.,
Plaintiffs,

v. Civil Action No. 93-1631-A

PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., ET AL.,
Defendants.

1994 U.S. Dist. LEXIS 21457
June 16, 1994, Decided
June 16, 1994, Filed

DISPOSITION

[*1] Plaintiffs' Motion for Summary Judgment GRANTED as to Counts I, II, IV and V, and DENIED as to Count III. Defendants' Motion for Summary Judgment GRANTED as to Count III and DENIED as to all other counts.

COUNSEL: For CACI, INTERNATIONAL, INC., CACI, INC - FEDERAL, Plaintiffs:

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For PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., JOHN C BAIRD, MITCHELL R LEISER, Defendants:

Joel Z. Robinson, New York, NY.

For MITCHELL R LEISER, defendant:

John Kenneth Zwerling, Zwerling & Kemler, P.C., Alexandria, VA.

For USA, interested party:

Robert A Spencer, U.S. Attorney's Office, Alexandria, VA.

JUDGE: Leonie M. Brinkema, United States District Judge.

OPINION BY: Leonie M. Brinkema

OPINION: MEMORANDUM OPINION

This matter is before the Court on motions for summary judgment. The central issue in this matter is whether plaintiffs have infringed a copyright by marketing software to a third party pursuant to a teaming agreement with the alleged copyright holder's [*2] subsidiary/licensee and the copyright holder's "successor in interest." Additionally, plaintiffs seek declaratory judgment regarding any infringement of defendants' trademark and damages for related state law claims of breach of contract, tortious interference with business relations, and defamation.

I

Plaintiffs moved for summary judgment on all issues pursuant to Fed. R. Civ. P. 56. Defendants filed an opposition to that motion in which they also moved for summary judgment on all issues. The Court's disposition of these matters is reflected in this opinion.

II

The ownership history of the software that is at the heart of this controversy is long and tortuous. Be-

cause this history bears on some of the issues in this matter, it will be necessary to recount it here, although every effort will be made to be succinct. The parties do not differ to any significant degree about these facts.

Defendant Pentagen Technologies International, Ltd. ("Pentagen") is an English corporation with an office in New York. Defendant Baird Technologies, Inc. ("BTI") is a Delaware corporation, also located in New York. BTI is the United States subsidiary of Pentagen. Defendant John Baird ("Baird") was an [*3] officer of both Pentagen and BTI during the time periods relevant to this lawsuit. He was also a developer of the MENTIX software, which is at the heart of the parties' dispute. Defendant Mitchell Leiser is a vice-president and director of Pentagen and was, at relevant times, an officer and director of BTI.

In 1989, Robert O'Brien invested in Pentagen through his company, Runaway Development Group, S.A. ("RDG"). Overall, O'Brien/RDG invested $400,000, part of which was common stock convertible into secured promissory notes of Pentagen. O'Brien exercised that option in Spring, 1990. Pentagen issued the notes which were secured by the intellectual property of Pentagen, namely MENTIX. On June 21, 1990, Pentagen assigned its patent applications to RDG. O'Brien also began acting as a director of Pentagen and BTI. Pentagen defaulted on the loan and O'Brien asserted ownership of the software through his own corporations RDG and Expert Objective Systems Development Corporation (EOSD). O'Brien also filed suit against Pentagen and BTI in New York alleging securities fraud. Pentagen counterclaimed, asserting that O'Brien/RDG converted the MENTIX software because the underlying

security interest [*4] was void under English law which does not allow for equity interests to be converted into secured loans.

At about the same time O'Brien/RDG converted equity interest in the fledgling software enterprise into a secured loan, BTI was marketing the MENTIX software to the Army Materiel Command (AMC), which is part of the United States Government Department of Defense. From all reports, the AMC was favorably impressed with the software, which purportedly translates programming applications from one language to another. Although the AMC expressed some interest in procuring the software, it had two notable reservations about the vendor, BTI. The first concern was that BTI had no "track record" of providing goods and services to the government, and therefore could not qualify as a "responsible party." The second concern was that BTI was a wholly owned subsidiary of an English company, and therefore its products would be difficult to procure in light of the Buy America Act. At this point BTI approached plaintiffs. CACI International ("CACI"), an international high-tech business for systems engineering and information sciences, is a Delaware corporation with its principal place of business [*5] in Virginia. CACI-Federal ("CACI-Fed") is a CACI subsidiary which focuses on systems integration, custom software development, and software engineering. BTI recognized that plaintiffs had significant experience marketing to the government and that CACI was recognized as a "responsible party." CACI and BTI, through its officer Baird and later through O'Brien, negotiated a teaming agreement under which CACI would market MENTIX to the AMC. BTI assured CACI that it had a Master Licensing Agreement with

Pentagen which allowed it to license MENTIX to third parties, such as CACI and the AMC.

During these negotiations two events occurred, unknown to CACI at the time, which bear on this present imbroglio. The first was Pentagen's defalcation on the O'Brien loan with the subsequent assertion of ownership rights over MENTIX by RDG. The second was Pentagen's failure to make the appropriate corporate filings in England, which resulted in the corporation being struck from the list of companies from March 1990 to September 14, 1990, during which time its assets, including the intellectual property MENTIX, was bona vacantia, and forfeit to the Crown.

O'Brien and BTI's counsel advised CACI that [*6] RDG was a successor in interest to Pentagen's MENTIX copyright. Having been provided with a copy of the assignment of Pentagen's rights by O'Brien, and having been informed that RDG was licensing its subsidiary EOSD to provide MENTIX for the teaming agreement, CACI amended the draft teaming agreement to reflect that change. CACI sent the revised draft to O'Brien and Baird. Baird did not respond, but O'Brien continued the negotiations. On August 15, 1990, CACI signed the teaming agreement with BTI (O'Brien signing as "acting CEO"), EOSD and O'Brien. In that agreement, BTI, EOSD and O'Brien warranted to CACI, Inc.-Federal that they had good title to or adequate rights to license MENTIX. However, later that same day, Baird told CACI that RDG did not have title to MENTIX and suggested that CACI not enter into the teaming agreement with them. CACI advised Baird that the teaming agreement had already been signed.

Concerned by this communication, CACI turned to O'Brien for assurances regarding the ownership of MENTIX and licensing capabilities of EOSD, BTI and O'Brien. O'Brien again sent a copy of the assignments. Thereafter, pursuant to the teaming agreement, CACI made a copy of the software [*7] in September 1990 and returned the original MENTIX disks to O'Brien.[19]

Based on these representations, CACI proceeded to perform under the teaming agreement by sending a "white paper" to the AMC recommending a research project to develop MENTIX into a product that would serve the AMC's needs. Next, CACI prepared and presented a business proposal outlining the method of reengineering AMC information systems to integrate databases and modernize systems. Several meetings were held with AMC to make presentations and answer questions. At the end of September, 1991, after this work had been done, Baird again contacted CACI and disputed O'Brien's rights to MENTIX. Baird faxed to CACI a copy of the counterclaim to a suit brought by RDG against Pentagen and Baird in New York. Although [*8] CACI was referenced in the counterclaim, it was not a party in that lawsuit.

Three days later, Baird also asserted his belief that CACI was on the verge of entering into a contract with the AMC involving MENTIX, and offered to sign the teaming agreement and to provide the licensing rights for MENTIX to CACI. On October 3,

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[19] This copying was a two-step process. The first version of the software which O'Brien sent reflected the copyright holder as Baird. CACI sought clarification and O'Brien sent new disks which reflected that EOSD was the copyright holder.

CACI informed Pentagen that there was no contract with the AMC. Pentagen again offered CACI what it believed were the necessary licensing rights and indemnification should CACI wish to proceed with an AMC procurement. At that point O'Brien again assured CACI that RDG had title to MENTIX. O'Brien sent another copy of the assignments. Additionally, NSL, the owner of the software from which MENTIX was derived, informed CACI by letter that "as far as we are concerned, Mr. Baird has no continuing arrangement or agreement with respect to Q'Nial."

CACI discontinued all activity related to marketing MENTIX to the AMC and began its own internal review of the situation. Eight weeks later, in January 1992, CACI terminated the teaming agreement and returned its copy of MENTIX to O'Brien. Defendants have presented no evidence of CACI making any additional copies of MENTIX or [*9] of getting any contract from AMC for this project.

The next month, the U.S. Army Information Systems Selection and Acquisition Agency issued a request for proposals for the Army's Sustaining Base Information Services ("SBIS") Program. CACI teamed with IBM to submit a proposal. In July 1993, IBM was awarded the SBIS contract, and CACI currently serves as a subcontractor to IBM on that contract.

At this point CACI was drawn into the litigation quagmire surrounding the ownership of MENTIX. In July 1993 Pentagen filed suit against CACI in the Supreme Court of New York claiming conversion of MENTIX based on CACI's marketing of the software to the AMC, as well as violations of the New York Penal Code and nonexistent sections of the Virginia Code of Criminal Justice based on the same market-

ing activity. CACI moved to dismiss in September, and that motion was still pending when, in January 1994, the action became removable to the federal court. That lawsuit is now on the docket of the United States District Court for the Southern District of New York and the motion to dismiss remains pending.

In December 1993, Pentagen filed a complaint against CACI in federal court alleging (1) copyright [*10] infringement under 17 U.S.C. § 501; (2) trademark infringement and unfair competition under §§ 32 and 43 (a) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125; and (3) a violation of the Major Fraud Against the United States Act, 18 U.S.C. § 1031. That complaint is based again on CACI's marketing MENTIX to the AMC and adds that CACI's use of its RENovate methodology and CACI's development of software on the SBIS contract will infringe Pentagen's copyright of MENTIX. CACI filed a motion to dismiss all counts of Pentagen's complaint on February 22, 1994.

Believing that the federal court in New York lacked jurisdiction over it and that Pentagen's claims would ultimately be litigated in the Eastern District of Virginia, CACI filed its complaint on December 22, 1993, seeking declaratory judgment regarding Pentagen's copyright infringement and trademark infringement and adding supplemental state law claims for damages arising from breach of contract, tortious interference with contract and defamation. Following this Court's ruling denying defendants' motion to dismiss, defendant BTI failed to file an answer. An Order entering [*11] Default Judgment against BTI issued on March 17, 1994.

With this background in mind, the Court now addresses the legal issues raised in the summary judgment motions.

III

Copyright infringement

The defendant owners of the MENTIX copyright are precluded as a matter of law from establishing copyright infringement with respect to some of CACI's activity while CACI possessed the software. Registration of a copyright is a prerequisite for bringing an infringement claim 17 U.S.C. § 411(a); *See Eastern Pub. and Advertising, Inc. v. Chesapeake Publ. & Advertising, Inc.*, 831 F.2d 488, 490 (4th Cir. 1987). Pentagen did not register its MENTIX copyright until December 7, 1993. Additionally, the statute of limitations for copyright infringement claims is three years from the date the cause of action accrued. Because the registration did not occur until December 1993, activities that predate December 1990 are not actionable under a copyright infringement theory. Defendants argue that the Court should consider the teaming agreement and marketing to the AMC as a continuous and on-going scheme and have the later alleged acts of infringement relate [*12] back to earlier activities. This Court has rejected any application of a "rolling statute of limitations" theory under the copyright law. *Hoey v. Dexel Systems Corp., et al*, 716 F. Supp. 222, 223 (E.D. Va. 1989). Therefore, activities predating December 7, 1990, are as a matter of law outside the scope of this lawsuit. Specifically, CACI's making one backup copy of MENTIX in September 1990 cannot constitute copyright infringement.

This Court limits its examination of the copyright infringement question to the marketing activities to AMC that occurred after December 7, 1993 and in connection with the SBIS contract. A claim of copyright infringement requires a showing of ownership of a valid copyright and unauthorized copying of the copyrighted work. *Avtec Systems, Inc. v. Peiffer*, 1994 U.S. App. LEXIS 6522, *7 (4th Cir. 1994). Although plaintiffs raise some challenges to defendants' ownership of a valid copyright, the central issue to be decided is whether marketing without actual distribution of a software package constitutes copyright infringement.[20] For the reasons set forth below, we hold that it does not.

The owner of a copyright under Title 17 has certain exclusive rights, including the right to authorize (1) the reproduction of a copyrighted work, (2) the preparation of derivative works based upon the copyrighted work, and (3) the distribution of copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, leasing, or lending. 17 U.S.C. § 106. In marketing the work to the AMC, plaintiffs offered to prepare a derivative work, MENTIX-MVS. There is no evidence in the record that the derivative work was actually prepared or that MENTIX was copied (within the statutory time frame) or distributed in any respect pursuant to the AMC dur-

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[20] Plaintiff argues that during the time Pentagen was not a registered company, March to September 1990, it cannot assert ownership of the copyright because its assets were bona vacantia and property of the Crown. Though the intricacies of British property law as they relate to the application of copyright ownership under the U.S. Code are of keen academic interest, the Court finds that the issues in this case can be squarely addressed without resort to such Rumpolean antics.

ing CACI's marketing efforts under the teaming agreement. In rebuttal to plaintiffs' evidence that it did none of those things, defendants offer only a statement by an AMC employee that he overheard a comment related to MENTIX from which he inferred that a copy of the software had been made by CACI and provided to the AMC. Such evidence does not rise to a genuine dispute of material fact, let alone act as proof of infringement. In claiming that a mere offer to provide a derivative work of copyrighted [*14] material constitutes infringement, defendants overlook an essential element of an infringement claim: that the work was copied. A copyright holder may prove copying by showing access to the copyrighted work and substantial similarity between the copyrighted work and the infringing work. *M. Kramer Mfg. Co., Inc. v. Andrews,* 783 F.2d 421 (4th Cir. 1986). Apart from the backup copy, there is no direct evidence of copying. There is no evidence in the record of a work that is "substantially similar" to MENTIX resulting from the AMC marketing efforts.

As to the SBIS contract, defendants contend that CACI's offer to provide re-engineering services through its RENovate methodology would necessarily require use of a product either derived from or substantially similar to MENTIX. CACI disputes that it had access to the MENTIX software at the time it teamed with IBM to prepare a proposal on the SBIS contract. The evidence supports CACI's assertion that MENTIX was returned the month before the government solicited SBIS proposals. Even if the Court draws the inference that CACI contemplated using a MENTIX-infringing copy or derivative in a government contract before the Army's [*15] request for proposals came out, particularly during the time

before the backup copy of the software was returned, there is still no evidence in the record that CACI created a product that is substantially similar to MENTIX. Moreover, the unrebutted evidence, specifically the report of Dr. Rotenstreich, plaintiffs' expert, reflects that MENTIX (or its derivative) could not perform the reengineering offered by CACI in the SBIS project. That report also concluded that MENTIX is almost "identical" to Q'Nial and that "as a software engineering tool Q'Nial can be replaced by many other tools that are much better and less expensive." Such a finding substantively undercuts defendants' arguments that a software product developed by CACI under the SBIS contract to provide software reengineering depended on access to MENTIX or would be substantially similar to MENTIX. Therefore, the Court finds that with respect to both the AMC marketing effort and the SBIS contract proposal, plaintiffs are entitled to declaratory judgment on Count I.

Trademark infringement

Plaintiffs seek declaratory judgment that their use of the word MENTIX in marketing efforts with the AMC does not constitute trademark [*16] infringement or unfair competition under 15 U.S.C. §§ 1114 and 1125. In addressing the issue of trademark infringement, the Court is without jurisdiction to look at claims arising before December 1991. Trademark infringement claims are subject to a two-year statute of limitations. *See Unlimited Screw Products, Inc. v. Malm*, 781 F. Supp. 1121, 1125 (E.D.Va. 1991). Defendants allege that plaintiffs deceived the United States government by stating to the AMC that it could legally provide MENTIX software when it allegedly could not. Those proposals, however, were

made before December 1991. There is no evidence in the record of activity by plaintiffs within the scope of the limitations period that could have infringed MENTIX's trademark. Therefore, this Court finds that plaintiffs are entitled to summary judgment as to count II.

Breach of Contract

Plaintiffs allege that defendants breached the teaming agreement which plaintiffs terminated on January 20, 1992. Under the terms of the August 15, 1990, teaming agreement between CACI and BTI/EOSD/O'Brien, BTI and EOSD warranted that they had good title or adequate right to license MENTIX and [*17] that they would indemnify and hold plaintiff CACI-Federal harmless with respect to infringement claims, and shall "(i) defend at its own expense, (ii) obtain through negotiation or (iii) modify the product to make it noninfringing while preserving the original functionality, so as to enable the parties to continue using such products as originally intended under this Agreement." Pltf. Ex. 4B. Plaintiffs seek to enforce the indemnification clause against both BTI, a signatory to the agreement, and Pentagen, as the alter ego of BTI which exercised pervasive control over BTI. Plaintiffs also ask the Court to find defendants Baird and Leiser personally liable because they held themselves out as officers of Pentagen during the time Pentagen was not a corporation, which included the time the teaming agreement was signed.

The Court has already entered default judgment against BTI, requiring BTI to indemnify and hold CACI harmless with respect to the claims asserted by Pentagen. Under the terms of the May 2, 1994 Order of this Court, CACI needs to establish that: (1)

Pentagen was BTI's alter ego; and (2) Baird and Leiser were Pentagen's or BTI's alter egos in order to obtain summary judgment [*18] against all three defendants.

The teaming agreement is governed by the law of Virginia. With respect to piercing the corporate veil, plaintiffs must show that BTI is "the alter ego, alias, stooge, or dummy of the individuals sought to be charged personally and that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *RF&P Corp. v. Little*, 247 Va. 309, 440 S.E.2d 908, 913 (Va. 1994) (quoting *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 360 S.E.2d 828, 831 (Va. 1987).

Plaintiffs direct the Court to a number of factors in arguing that Pentagen was BTI's alter ego: the directors of Pentagen and BTI were "essentially identical", the boards of directors met simultaneously, BTI borrowed substantial sums from Pentagen which have not been repaid (because BTI is insolvent), and Pentagen owned a majority of BTI's stock. Given these facts, plaintiffs argue, the Court should find that Pentagen was the alter ego of BTI. Virginia courts are reluctant to pierce the corporate veil in contract situations. *Beale v. Kappa Alpha Order*, 192 Va. 382, 64 S.E.2d 789 (1951); *Garrett v. Ancarrow Marine, Inc.*, 211 Va. 755, 180 S.E.2d 668 (1971). [*19] This is especially true where, as here, the two companies have held themselves out as separate entities, separate records are kept, and the formalities associated with corporate entities are observed. Moreover, under the facts developed in this record, it was BTI as controlled by O'Brien, not Pentagen, which entered into the teaming agreement. The Court, therefore, denies plaintiffs' request for summary judgment

on Count III. Under the default judgment already entered plaintiffs are entitled to an ex parte hearing in which to offer proof of damages as to BTI.

Tortious interference with business relations

Plaintiffs claim that defendants Pentagen, Baird and Leiser have tortiously interfered with CACI's contract with IBM to perform work on the SBIS program. To prove tortious interference with contract under Virginia law, plaintiffs must show "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy [*20] has been disrupted." *Duggin v. Adams*, 360 S.E.2d 832, 835, 234 Va. 221 (Va. 1987) (quoting *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97, 102 (Va. 1985).

Defendants do not dispute any of the facts alleged by plaintiffs. CACI teamed with IBM to perform work under the SBIS contract and is a subcontractor for the SBIS contract. Pentagen was aware of the contractual relationship between IBM and CACI, as evidenced by Pentagen's press releases of October 28, 1993 and December 10, 1993 which reference the IBM/CACI contract. There is also undisputed evidence that Pentagen communicated with other parties to the SBIS contract, such as the Army and other contractors in an attempt to interfere with CACI's contractual relationship with IBM. Indeed, Pentagen threatened IBM, other subcontractors and the Army with litigation for associating with CACI and urged a losing bidder to pursue a bid protest of the SBIS

award based on the allegation that CACI was infringing on the MENTIX software copyright.

CACI argues that Pentagen's interference was premeditated and harassing. As a result of Pentagen's action IBM advised CACI that CACI could not use its RENovate methodology on the [*21] SBIS contract without IBM's prior written authorization. Because of discovery abuses and failure to follow court orders, defendants were precluded on May 2, 1994, from submitting evidence on the issue of tortious interference.

CACI has not submitted evidence that Baird and Leiser acted as other than officers of Pentagen when these interfering actions were made. All these actions were taken after Pentagen had been reinstated as a corporation. Therefore, the Court does not find individual liability on this count as to Baird and Leiser for whom summary judgment is granted. However, as to the corporate defendants, the Court finds that plaintiffs are entitled to summary judgment on Count IV in an amount to be determined at trial.

Defamation

Plaintiffs seek recovery for defamation, contending that Pentagen alleged in a press release dated September 13, 1993, and elsewhere, that CACI used and marketed the MENTIX computer software or a derivative of MENTIX as a significant component of CACI's RENovate process. This Court must follow the legal standard for defamation articulated in *Swengler v. ITT Corp.*, 993 F.2d 1063 (4th Cir. 1993), which holds that under Virginia [*22] law it is defamation per se to prejudice a person in his trade, and that prejudice arises from statements "which cast aspersion on its honesty, credit, efficiency or its pres-

tige or standing in its field of business." *Id.*, quoting *General Products Co., Inc. v. Meredith Corp.*, 526 F. Supp. 546, 549-50 (E.D. Va. 1981). In an October 28, 1993, press release Pentagen alleged that CACI's SBIS software bears a striking similarity to MENTIX and infringes Pentagen's copyright and trademark in MENTIX. CACI offered to allow Pentagen to review records that would demonstrate that CACI was not using MENTIX software in connection with RENovate, but Pentagen did not accept the offer. The record further reflects that Pentagen made those public statements with knowledge that they were false. Specifically, after defendant Leiser conducted his own "investigation" in September, 1993 of plaintiffs' RENovate methodology he concluded that "Renovate is a process and it is !!!!!TOOL INDEPENDENT!!!!" To put it clearly, defendants knew that plaintiffs' RENovate process did not infringe the MENTIX copyright at all before they issued press releases to the contrary. After the public allegations [*23] were made, the defendants purposefully ignored opportunities to learn the facts relevant to their allegations. Plaintiffs have established by clear and convincing evidence that defendants acted with malicious intent and are therefore entitled to punitive damages. Swengler, supra.

Therefore, the Court finds that plaintiffs are entitled to judgment on count V and the trial will go forward to determine the amount of compensatory and punitive damages.

Entered this 16th day of June, 1994.

Leonie M. Brinkema
United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion, plaintiffs' Motion for Summary Judgment is GRANTED as to Counts I, II, IV and V, and DENIED as to Count III. Defendants' Motion for Summary Judgment is GRANTED as to Count III and DENIED as to all other counts. It is hereby

ORDERED that judgment is entered against Pentagen Technologies International, Ltd. on Counts I and II, declaring that: plaintiffs' marketing efforts directed at the AMC did not infringe Pentagen's MENTIX copyright; CACI's RENovate process does not infringe Pentagen's MENTIX copyright; the work to be performed by CACI on the SBIS contract does [*24] not infringe Pentagen's MENTIX copyright; and plaintiffs' marketing efforts directed at the AMC did not infringe any trademark held by Pentagen.

Further, it is hereby

ORDERED that judgment is entered against Pentagen Technologies International, Ltd. on Count IV, as to Pentagen's liability for tortiously interfering with the contractual relationship between CACI-Federal and IBM.

Further, it is hereby

ORDERED that judgment is entered against Pentagen Technologies International, Ltd., Baird and Leiser as to Count V, as to the defendants' liability for defamation per se.

Further, it is hereby

ORDERED that judgment is entered against plaintiffs with respect to defendants Pentagen Technologies International, Ltd., Baird and Leiser as to Count III.

In sum, the issues that remain for trial on June 20, 1994 are damages on Count IV, compensatory and

punitive damages on Count V, and plaintiffs' ex parte proof of damages against BTI on Count III.

The Clerk is directed to forward copies of this Order and the Memorandum Opinion to counsel of record.

Entered this 16th day of June, 1994.

Leonie M. Brinkema
United States District Judge
Alexandria, Virginia

2. JUDGE CACHERIS DECISION DATED APRIL 10, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CACI INTERNATIONAL, INC., ET AL., Plaintiffs,	)
	) Civil Action
V.	) No.CV–93-1631-A
PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., ET AL., Defendants.	)

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion for Relief from Final Judgment Under Federal Rule of Civil Procedure 60(b) (6) and plaintiffs' Motion for Costs and Sanctions.

I.

The instant motion involves the latest chapter in a long and convoluted dispute over the alleged "theft" of Defendant Pentagen International Technologies Ltd's ("Pentagen's") "MENTIX" software. According

to Pentagen, CACI International, Inc. ("CACI" or Plaintiffs) "stole" its software between 1990 and 1991 under the guise of a teaming agreement into--which Pentagen's successor in interest had entered with CACI in order to market the MENTIX software to the Army Materiel Command ("AMC") Although several suits have been filed in this case in various courts, the issues presented here relate primarily to litigation [*2] initiated by Pentagen in New York in 1993, and a connected suit for declaratory judgment brought by CACI, the plaintiffs herein, in the Eastern District of Virginia. By way of background, the Court adopts the findings of the very thorough and concise analysis rendered by this court in Judge Brinkema's Memorandum Opinion of June 16, 1994. *CACI Int'l Inc. v. Pentagen Techs. Int'l. LTD.* No. CIV.A.93-1631-A, 1994 WL 1752376 (E.D. Va. June 16, 1994) ("Pentagen III"), *aff'd*, Nos. 94–2058, 942220, 1995 WL 679952 (4th Cir. Nov. 16, 1995) (per curiam) ; *see also Pentagen Techs. Int'l LTD v. United States*, 172 F. Supp.2d 464, 468–70 (S.D.N.Y. 2001) (chronicling history of MENTIX - software - derived litigation from inception through the tenth–filed action) ("Pentagen IX").

The relevant facts consist of the following. In July 1993, Pentagen filed a claim against CACI in the Supreme Court of New York alleging that CACI had converted its MENTIX software by marketing it to the AMC[21], which was later removed to federal court. See Pentagen III, 1994 WL 1752376, at *3. Pentagen

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[21] In addition, Pentagen alleged "violations of the New York Penal code and nonexistent sections of the Virginia code of criminal Justice" arising from the same activity. Pentagen III, 1994 WL 1752376, at *3.

also filed a complaint in federal court in New York in December 1993, alleging, inter alia, copyright and trademark infringement and a violation of the Major Fraud Against the United States Act, 18 U.S.C. § 1031 *Id.* [*2]

In response, on December 22, 1993, CACI filed a declaratory judgment action in the Eastern District of Virginia. *Id.* In the declaratory judgment action, CACI sought a determination that it had not infringed upon Pentagen' s trademark or copyright. *Id.* CACI also brought supplemental state law claims for breach of contract, tortious interference with contract, and defamation. *Id.* In June, 1994, this court determined that CACI had not infringed upon Pentagen' s copyright or trademark based on evidence that showed that CACI had returned copies of the MENTIX software it had acquired pursuant to the teaming agreement. More specifically, the court held that CACI had not infringed upon Pentagen's copyright or trademark because (1) it found no evidence that CACI had copied the software after December 7, 1993 – the date Pentagen registered its MENTIX copyright - or that CACI had used a MENTIX-derivative in the subsequent government contract it later obtained; and (2) it found no evidence that CACI had infringed MENTIX's copyright or trademark prior to December 1990 or 1991, the respective dates on which the statute of limitations began to run on the copyright and trademark infringement claims. *see id.* at *3*5.

After numerous other attempts to re-litigate these matters in the Southern District of New York, the District of Columbia, and the Court of Federal Claims, Pentagen now asserts that it has uncovered new evidence proving a fraud upon the Court [*3] which warrants relief from the final judgment ren-

dered in the 1994 Memorandum Opinion. According to Pentagen, CACI and the Government have been conspiring to conceal an "unauthorized pre-1993 Secret Test" of the MENTIX software, the occurrence of which, Pentagen contends, proves CACI's and the Government's possession of the software.

In addition to opposing Pentagen's Rule 60(b) (6) motion, CACI asserts that the federal copyright act requires the Court to award CACI costs and attorneys' fees related to Pentagen's motion. It also seeks an order from this Court preventing Pentagen from filing any further related actions in this District without prior court approval.

II.

A. Pentagen's Rule 60(b) (6) Motion

CACI argues that Pentagen's motion should be denied because (1) the motion is barred by res judicata; (2) Pentagen cannot make the four threshold showings required before a court may consider a Rule 60(b) motion; and (3) even if Pentagen could meet the four threshold requirements, it could not show that a fraud has been committed upon the Court, as argued by Pentagen. The Court agrees on the grounds that not only is the motion barred by res judicata, but also because Pentagen cannot meet the four threshold requirements. [*4]

1. Res Judicata

Pursuant to the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies on the same cause of action." *United States v. Mendoza*, 464 U.S. 154, 159 n.3 (1984) (citing *Montana v. United States*, 440 0.5. 147, 153 and *Parklane Hosiery Co. v. Shore*, 439 U.S.322, 326 n.5 (1979)); *see also Lawson v. Toney*, 169 F.

Supp.2d 456, 462 (M.D.N.C. 2001) ("Under the doctrine of claim preclusion, or res judicata, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (citation omitted) According to the Supreme Court, "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153–54 (citations omitted).

As pointed out by CACI, Pentagen has made three other attempts to bring this allegedly "new evidence" to the attention of the federal courts in order to reopen this litigation, all of which were denied. First, in *Pentagen Techs. Int'l. Ltd. v. United States* ("Pentagen IX") , the Southern District of New York [*5] determined that "such evidence does not provide any basis for relief from the judgment in the Copyright Action," *i.e.*, Pentagen III. 103 F. Supp.2d 232, 238 (S.D.N.Y. 2000) (denying leave to amend because "all the federal claims advanced by plaintiffs' proposed Second Amended Complaint would be futile") . After Pentagen filed the disallowed amended complaint in a new action, see *United States ex rel. Pentagen Techs. Int'l Ltd. v. United States*, No. 00 CIV. 6167(DAB), 2001 WL 77094O (S.D.N.Y. July10, 2001) ("Pentagen X") , *reconsideration denied* 2001 WL 946375 (S.D.N.Y. Aug. 21, 2001), the Southern District of New York declared that the denial of Pentagen's request to file a Second Amended Complaint in Pentagen IX had res judicata effect. *Id.* at

*9 ("Accordingly, the denial of the proposed amendment in Pentagen IX precludes the Relators from attempting to raise in this action claims which were already found to be futile."). Finally, in *Pentagen Techs. Int'l Ltd. v. United States*, 01 Civ. 3078(SHS), 2002 WL 465308 (S.D.N.Y. Mar. 26, 2002) ("Pentagen XI"), the Southern District of New York found Pentagen's most recent attempt (excluding the instant motion) to assert that it had uncovered supposedly new evidence, i.e., the deposition of a government witness (the "Brasseur testimony") , of a second "Secret Test" to fail on the grounds of claim and issue preclusion. *see id.* at *13 – *19.

As evidenced by the above decisions, the claims raised [*6] by the current motion have been determined in at least three prior actions to be barred by the doctrine of res judicata. Pentagen therefore is precluded from re-litigating its motion for relief from the 1994 judgment here. *See generally Fayetteville Investors v. Commercial Builders. Inc.*, 936 F.2d 1462, 1471 (4th Cir. 1991) (recognizing that dismissal pursuant to Rule 12(b) (6) "is accordéd res judicata effect").

2. Four Threshold Requirements for Rule 60 Motion

In addition to being barred by the doctrine of res judicata, the instant motion does not meet the minimal requirements necessary to warrant the Court' s consideration under Federal Rule of Civil procedure 60 (b) , which governs relief from judgment or orders. Fed. R. Civ. P. 60(b). The rule allows a court to relieve a party from a final judgment where the party can prove some mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or "for any other reason justifying relief from the operation of

the judgment." *Id.* Subpart (b) (6) constitutes a "catch all" which may be invoked "when the judgment was obtained by the improper conduct of the party in whose favor it was rendered or by an excusable default," *Holland v. Virginia Lee Co. , Inc.*, 188 F.R.D. 241, 252 (W.D. Va 1999) (citing *United States v. Cato Bros., Inc.*, 213 F.2d 153, 157 (4th Cir. 1959), "or in other 'extraordinary circumstances.'" *id.* (quoting *Ackerman v. United States*, 340 U.S. 193, 199 (1950)); *see also* [*7] *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48(4th Cir. 1993).

As alluded to above, before a court will consider any of the six grounds for relief identified in Rule 60(b), a movant seeking such relief must first make four threshold showings, including: (1) timeliness; (2) a meritorious defense; (3) a lack of unfair prejudice to the opposing party; and (4) exceptional circumstances. *Coomer v. Coomer*, No. 98-2236, 2000 WL 1005211, at *4 (4th Cir. July 20, 2000) (citing *Dowell*, 993 F.2d at 48). As Rule 60 (b) remedies constitute "extraordinary" relief to be used "only in 'exceptional circumstances,'" district courts "must rigorously examine [the] four predicate requirements" before contemplating whether any merit exists to the claim. *Id.* (quoting *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir. 1979)) . Here, Pentagen cannot meet the four threshold requirements necessary to reach the question presented in its Rule 60(b) (6) motion.

First, the motion is not timely. The allegedly new evidence of a "Secret Test" of which Pentagen has become aware surfaced in April 2000. Having waited almost two years to bring this supposedly new evidence to the attention of this Court precludes a finding that the motion is timely. That Pentagen contends it waited to confirm the veracity of its evidence

of a Secret Test is meritless, as illustrated by its attempts to bring

[*8] this evidence to the attention of the Southern District of New York in two separate actions.

Second, Pentagen has not shown that it will present a meritorious defense if relieved from the judgment and given another chance to litigate the matter. Although Pentagen repeatedly alludes to inferences and "probabilities" that CACI and the Government have conspired to develop and test a MENTIX– derived product, Pentagen has presented no evidence that CACI copied the software after 1993, as required to find liability per the 1994 Memorandum Opinion. In fact, at oral argument Pentagen adamantly contended that a Secret Test occurred somewhere between 1990 and 1991, long before CACI could have incurred any liability for copyright or trademark infringement. *See* 03/04/02 Tr. at 25:20–26:25.) Moreover, the only "evidence" Pentagen has presented in support of its Rule 60(b) (6) motion are inferences that CACI copied the MENTIX software based on the inconsistent testimony of one government witness and the Government's "suspiciously" consistent contention that it has no information that it tested the MENTIX software. Specifically, Pentagen contends that a government witness's inconsistent deposition testimony (the Brasseur testimony) from a British-filed action proves that the "Secret Test" was conducted. According to Pentagen, the fact that the witness originally testified that only one evaluation had been done of MENTIX and that the software [*9] was not portable to the Government's machines but later asserted on cross–examination that the AMC had undertaken two technical evaluations of MENTIX, instead of one, and that the software was portable to

the Government's "3090 machines" proves that CACI copied the software. (Mem. in Support of Notice of Mot. of Defs.' for Relief from Final J. Under Fed. R. Civ. P. 60(b) (6) at 16.) Pentagen also contends that the Government's calculated refusal to admit in multiple Freedom of Information Act (FOIA) responses that it had any information at all about a MENTIX test, in light of the Brasseur testimony, supports Pentagen's motion. However, other than these baseless assertions, Pentagen has offered no concrete evidence that a conspiracy is afoot to hide the existence of a second test or that a second test even occurred during the relevant time period. Simply put, such inferences do not support a finding that Pentagen will present a meritorious defense should the Court grant its motion.

Third, re-opening this litigation would unfairly prejudice CACI, who, although absolved of any wrongdoing in 1994, has repeatedly been pulled back into litigating this matter through Pentagen's fruitless attempts in three other courts to re-open this case. In fact, the only fair outcome for CACI would be a reprieve from Pentagen' s vexatious litigation.

Finally, Pentagen has presented no exceptional circumstances that would warrant granting Pentagen relief from [*10] the final judgment. As stated above, Pentagen merely has offered a series of probabilities and shadowy inferences that the alleged behavior of the Government and CACI's attorneys constitutes exceptional circumstances, *i.e.*, a fraud upon the court. However, no such evidence has been presented other than incongruous testimony that fails to state when the alleged second test occurred. As aptly stated by the Supreme Court of Virginia, "[i]n order for inferences to amount to evidence they must be in-

ferences based on facts that are proved, and not inferences based on other inferences." *Thomas v. Virginia*, 187 Va. 265, 271, 46 S.E.2d 388, 391. (1948) (quotations and citations omitted) . Here, because Pentagen has made no other showing of exceptional circumstances other than to assert that a miscarriage of justice is afoot based on a series of inferences based on inferences – and no evidence – it also fails to meet the fourth requirement.

3. CACI's Motion for Costs and Sanctions

CACI asserts that Pentagen's motion for relief from the 1994 Memorandum Opinion warrants an award of attorneys' fees and costs as well as an injunction prohibiting Pentagen from making further filings without first obtaining leave of court. The Court agrees as discussed below.

B. Costs

According to CACI, the Copyright Act permits a court to [*11] award costs and attorneys' fees to prevailing parties. Section 505 of the Copyright Act states, in relevant part, that:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . . Except as otherwise provided by this title. the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. The Fourth Circuit determined in *Rosciszewski v. Arete Assocs., Inc.*, that "[i]n deciding whether to award attorneys' fees and costs under § 505, the district court should consider, and make findings with respect to," three main factors, including: (1) the parties' motivation; (2) the weight of the "objective reasonableness of the legal and factual po-

sitions advanced"; and (3) "'the need in particular, circumstances to advance considerations of compensation and deterrence.'" 1 F.3d 225, 234 (4th Cir. 1993) (noting that factors "are not intended as an exhaustive list") (quoting *Lieb v. Topstone Indus.*, 788 F.2d 151, 156 (3d Cir. 1986)) . After *Rosciszewski*, the circuit court expanded the list to include "'any other relevant factor presented.'" *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 505-06 (quoting *Rosciszewski*, 1 F.3d at 234); *see also Superior Form Builders v. Dan Chase Taxidermy Supply Co., Inc.*, 881 F. Supp. 1021, 1024 (E.D. Va. 1994) (Smith, J.) (awarding attorneys' fees pursuant to § 505 of the Copyright Act), *aff'd*, 74 F.3d 488 (4th Cir. 1996), *cert. denied*, 519 U.S. 809 (1996) . Based on an [*12] evaluation of these four factors, the Court finds that the award of attorneys' fees and costs is appropriate in this case.

The first factor to consider – the motivation of the parties – concerns the "willful infringement or bad faith on the part of the opposing party." *Rosciszewski*, 1 F.3d at 234. According to CACI, the record is replete with evidence that tends to show that Pentagen has acted in bad faith in pursuing its Rule 60 motion. (Pls.' Mem. in Support of Mot. for Costs and Sanctions at 3.) The Court agrees. In addition to this Court, two other courts have determined that Pentagen's Rule 60 motion is baseless. Moreover, by bringing the very same claim here, Pentagen evinces bad faith and wastes judicial resources.

Second, the objective reasonableness factor strongly favors CACI. In particular, the Court finds that the position advanced by Pentagen is frivolous as it is supported by no evidence and has already been found to be barred by res judicata.

Third, the record in this case requires the imposition of attorneys' fees and costs to deter the proliferation of future frivolous litigation as seen here. *see. Diamond Star*, 30 F.3d at 506 (noting "the goal of deterring a party from pursuing frivolous litigation is furthered by the imposition of attorney's fees and costs").

Finally, in considering other relevant factors, it is impossible not to count against Pentagen its repeated futile and [*13] frivolous attempts at litigating a matter that has long been decided - attempts which have been made despite the imposition of sanctions, *see, e.g.*, Pentagen IX,' 172 F. Supp.2d at 473-74 (directing Defendants' counsel "to personally compensate the CACI defendants for their' attorneys' fees and costs incurred in defending the instant matter"; prohibiting the filing of "further litigation without permission of the Court"; and imposing Rule 11 sanctions for "venturing far beyond the standard of objective unreasonableness"); *Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.*, No. 94 Civ. 2925, 1996 WL 11299, at *13 (S.D.N.Y. Jan. 4, 1996) ("Pentagen V") (declining to impose monetary sanctions but granting dismissal as an "appropriate sanction") ; despite exactions from Pentagen that it would not pursue further related actions, see Pentagen IX, 172 F. Supp.2d at 469-70 (explaining that in course of appealing sixth–filed action, "plaintiffs' counsel represented to the court that he would refrain from bringing any further related actions") ; and despite clear admonitions that Pentagen's pursuit of its claims was frivolous and a drain on judicial resources: *see, e.g.*, Pentagen X, 2001 WL 770940, at *10 (viewing filing of action in Pentagen X as a "pusillanimous attempt[] to circumvent judicial rulings" which the court observed "with

a jaundiced eye") ; Pentagen V, 1996 WL 11299, at *16 (characterizing Pentagen's counsel's arguments as "admittedly ridiculous") . Without some sanction, the Court is [*14] certain that Pentagen will not be discouraged from reviving its claim in this Court as well.

In consideration of these factors, the Court finds that it would be an abuse of discretion not to award attorneys' fees and costs upon Defendants and Defendants' counsel. *See Diamond Star*, 30 F.3d at 506 (stating that "when a party has pursued a patently frivolous position, the failure of a district court to award attorney's fees and costs to the prevailing party will, except under unusual circumstances, constitute an abuse of discretion") . Moreover, regardless of the statutory allowance for costs and attorneys' fees in copyright actions, the Court would nevertheless find the antics employed by Pentagen via the instant motion to merit the exercise of the Court's inherent power to assess attorneys' fees and costs. *See Alveska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 258-59 (1975) (citing *F.D. Rich Co., Inc. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)) . Before the Court will impose attorneys' fees and costs, however, it must first review any petition for such expenses pursuant to the standards established in *Barber v. Kimbrell's. Inc.*, 577 F.2d 216,226 & n.28 (4th Cir. 1978), and later refined by *Daly v. Hill*, 790 F.2d 1071~ 1077 (4th Cir. 1986), as required by *Rosciszewski. see* Rosciszewski, 1 F.3d at 234 n.8 ("We remind the district court that if it finds an award to be appropriate, it must make specific findings on each of the [*15] factors set forth in [*Barber*]."); *see also Superior Form*, 881 F. Supp. at 1025 and 1025 n.2 (noting that variables for fee calculation

must be established in accordance with *Daly and Johnson v. Georgia Highway Exoress. Inc.*, 488 F.2d 714, 717-19 (5th Cir. .1974) in light of the Supreme Court's decision in *Blum v. Stenson*, 465 U.S. 886, 900-02 (1984)). Accordingly, the Court will reserve ruling on the award of costs and attorneys' fees until it has had an opportunity to review CACI's petition for costs and attorney's fees as well as Pentagen's response.

C. Sanctions

In addition to costs and attorneys' fees, CACI requests an order prohibiting further filings by Pentagen without leave of court. As described in detail below, the Court finds that the circumstances of this case warrant the entry of such an injunction.

Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), a court may enjoin parties before it "'from attempting to relitigate decided issues and to prevent collateral attack of its judgments.'" *Scardelletti v. Devlin*, 265 F.3d 195, 211 (4th Cir. 2001) (quoting *In re March*, 988 F.2d 498, 500 (4th Cir. 1993)), *cert. granted, Devlin v. Scardelletti*, 70 U.S.L.W. 3378 (U.S. Dec. 10, 2001) (No. 01-417). In addition, "[f]ederal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their [*16] ability to carry out Article III functions." *In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984) (upholding injunction barring, *inter alia*, further filings by plaintiff where plaintiff "maintained an incessant stream of frivolous or meritless motions, demands, letters to the court and other documents, as well as vexatious lawsuits against the bankruptcy judges, trustees, attorneys and their families and associates, and against [the judge) himself"). While "[l]itigiousness alone will not

support an injunction restricting filing activities . injunctions are proper where the litigant's abusive and lengthy history is properly set forth." *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (citations omitted).

In granting such injunctions, courts must abide by the terms of Federal Rule of Civil Procedure 65(d), which provides that "'[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.'" *Scardelletti*, 265 F.3d at 211 (quoting Fed. R. Civ. P. 65(d)); *see also Tripati*, 878 F.2d at 354 (stating that "there must be some guidelines as to what plaintiff must do to obtain the court's permission to file an action.") Prefiling injunctions which limit access to the courts especially "must be 'carefully tailored' to address the specific circumstances [*17] presented." *Tinsley v. Moore Bus. Forms, Inc.*, No. 93-2086, 1994 WL 249239, at *1 (4th Cir. June 9, 1994) (remanding with instructions to redraft injunction) (citing *Tripati*, 878 F.2d at 352). Moreover, the party against whom the injunction is ordered is "entitled to notice and an opportunity to oppose the court's order before it is instituted." *Tripati*, 878 F.2d at 354 (citations omitted)

Here, the Court notes as a threshold matter that Pentagen has received notice of the injunction requested and has had an opportunity to file its opposition. Having reviewed the parties' oral and written submissions, the Court finds that the record warrants an injunction.

With respect to the MENTIX software, Pentagen has filed eleven separate cases. Since at least 1994,

when this Court decided the copyright infringement and trademark actions, Pentagen has undertaken to vexatiously litigate these matters, squandering the resources of at least three separate courts as well as countless defendants. It now brings this motion without a shred of hard evidence on which to base its contentions of fraud. .

In recognition of the flagrant bad faith and vexatious nature of Pentagen' s conduct, and with the intent to prevent such future conduct, the Court will enjoin any application for relief brought by Pentagen or an agent, servant, or employee of [*18] Pentagen, without that party's first filing a motion for leave to file such suit or motion accompanied by a memorandum that sets forth supporting grounds for such application. *see Savers v. Commissioner of Internal Revenue*, No. 91-1072, 1991 WL 237936, at *1 (4th Cir. Nov. 18, 1991.) (affirming district court's injunction from future filing of suits on grounds that a "district court's discretion in tailoring appropriate restrictions upon a party's ability to initiate future proceedings is 'extremely broad' and should not be disturbed on appeal absent an abuse of discretion") (citing *Tripati*, 878 F.2d at 354) . The Court notes that it reserves the right to revisit the injunction should the Order herein fail to completely prevent further vexatious litigation on the part of Pentagen or its agents. The attached Order will set. forth the specific conditions of such injunction.[22]

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[22] As in *Martin-Trigona v. Lavien*, 592 F. Supp. 1566, 1575 (D. Conn. 1984), the court here specifically notes that nothing in the accompanying Order shall be construed as having any effect on Defendants or Defendants' counsel's ability to defend against any criminal action; shall not deny access to the courts through filing of a petition for a writ of habeas corpus where applicable,

IV

For the foregoing reasons, Defendants' Motion for Relief from Final Judgment Under Federal Rule of Civil Procedure 60(b) (6) will be denied. Plaintiffs' Motion for Costs and Sanctions will be granted. An appropriate Order shall issue.

April 10, 2002 /s/

Alexandria, Virginia

/s/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CACI INTERNATIONAL,)
INC., ET AL.,)
Plaintiffs,)

---

provided, however, that the relief sought in any such petition on its face concerns only the legality of incarceration or the conditions of confinement; and shall not be construed as prohibiting Defendants or Defendants' counsel or any person or entity acting on the behalf of Defendants or Defendants' counsel from filing a complaint pursuant to 28 U.S.C. § 312(c) see *Martin-Tricona*, 592 F. Supp. at 1575.

Persons under the belief that they have information sufficient to form the basis of a complaint that Defendants or Defendants' counsel or any person or entity acting, purporting to act, or apparently acting on his behalf or in concert with Defendants or Defendants' counsel, has violated any provision of the accompanying injunction shall make such complaint in writing to the United States Attorney for the Eastern District of Virginia, with a copy sent directly to the Office of the Clerk of this court. The United States Attorney shall reply in writing to the complainant within thirty (30) days of the receipt of any such complaint concerning the action, if any, that the United States Attorney intends to take with respect thereto, and a copy of such reply shall be filed with this Court. *Cf. id.*

	) Civil Action
V.	) No.CV–93-1631-A
	)
PENTAGEN TECHNOLOGIES	)
INTERNATIONAL, LTD., ET AL.,	)
Defendants.	)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Defendants' Motion for Relief from Final Judgment Under Federal Rule of Civil Procedure 60(b)(6) is DENIED;
2. Plaintiffs' Motion for Costs and Sanctions will be GRANTED with respect to costs subject to a review of a summary of Plaintiffs' costs and attorney's fees. Plaintiffs shall have ten (10) days from the date of entry of this Order to file a petition for their attorneys' fees and costs incurred to defend the instant matter, and Defendants shall have twenty (20) days from the date of the entry of this Order to respond;
3. Plaintiffs Motion for an Injunction is GRANTED. Defendants Pentagen Technologies International Ltd., et al., and any of Defendants' agents, servants, and employees are hereby:
   a) Permanently enjoined from filing or attempting to initiate any new lawsuit, action, proceeding, or matter in the U.S. District Court for the Eastern District of Virginia against Plaintiffs, Plaintiffs' counsel, or other litigants, e.g., persons or entities who have been Pentagen's adversaries in past proceedings, without first obtaining leave of this Court. Defendants and Defendants' agents, servants,

and employees may seek leave of court by filing with the complaint or document purporting to commence a lawsuit, action, proceeding, or matter a motion captioned "Application Pursuant to Court Order Seeking Leave to File," to which shall be attached (1) a copy of this Order and the accompanying Memorandum Opinion; (2) the 1994 Memorandum Opinion; and (3) either an affidavit or an unsworn declaration pursuant to 28 U.S.C. § 1746 certifying whether or not the claim to be presented is a claim ever raised by Defendants or Defendants' agents, servants, and employees in any court, agency, tribunal, committee, or other forum. Failure to comply with the terms of this Order will be sufficient grounds to deny any motion for leave to file; and

b) Ordered that all provisions of this Order that apply to Defendants and Defendants' counsel, Joel Z. Robinson, shall apply equally to persons or entities acting at the behest of or at Defendants' direction or instigation, or in concert with Defendants or Defendants' counsel; and

The Clerk of the Court shall forward copies of this ORDER and the accompanying Memorandum Opinion to all counsel of record.

April 10, 2002 /s/

Alexandria, Virginia
UNITED STATES DISTRICT JUDGE

APPENDIX D
AFFIDAVITS IN SUPPORT OF 2006 MOTION TO JUDGE LYNCH

1. AFFIDAVIT OF JOHN C. BAIRD IN SUPPORT

Affidavit of J.C. Baird sworn 14 April 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RUNAWAY DEVELOPMENT GROUP, S.A.	:
Plaintiff,	:
–against–	:
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, JOHN C. BAIRD AND MITCHELL R. LEISER	: 91 Civ. 5643 (JES)
Defendants	:

----------X

AFFIDAVIT OF JOHN C. BAIRD.
CEO OF JUDGMENT CREDITOR

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK)
COUNTY OF NEW YORK)

I, JOHN CAMERON BAIRD, whose address is 430 East 86th Street Suite 9D, New York, NY, 10028, being duly sworn, state as follows:

1. I am Chairman and Chief Executive Officer of Pentagen Technologies International Limited ("PTI"), the Judgment Creditor in this action, and I am familiar with all the facts and circumstances in this action. The facts stated in this affidavit are

within my personal knowledge, unless stated to be on information and belief, as to which I believe them to be true.

The Teaming Agreement to Market the 3090 Version of Mentix

2. Prior to the August 1990 forcible seizure from PTI of the MENTIX software then in the process of development, representatives of CACI, Inc. and CACI-Federal, Inc. (collectively, "CACI") expressed excitement in being involved in the 3090 MENTIX software project Within two days of the forcible seizure, on August 15, 2000, CACI entered into a Teaming Agreement with RDG Group's affiliate, Expert Objective System Development Corporation (collectively,
3. The CACI/RDG Teaming Agreement, attached as Exhibit A hereto, provided for the parties to develop a version of MENTIX, to be known as MENTIX-MVS, which would operate on IBM 3090 machines (Par. 1).
4. The equivalent of six full time software engineers from the two companies plus a project manager from CACI was to be devoted to the project (Statement of Work, Par. D). It was anticipated that the development work would take six months (Statement of Work, D.2.), and that licenses would be granted to the Tennessee Valley Authority ("TVA") and the U.S. Army Material Command ("AMC")(Statement of Work, Par. B, which together were defined as the "Customer" (Par. 1).
5. The Statement of Work provided that in no event could either party grant licenses in source code form without the written approval of the other party (Par. B). However, the Teaming Agreement

provided in Par. 5(d) that if EOSD could not perform in its role as subcontractor, CACI would be deemed to have a perpetual, exclusive, paid up license to MENTIX-MVS.

First Copy of the MENTIX Source Code

6. Initially, one copy of MENTIX, which included a copy of source code, was available to CACI. It was transferred by RDG in September 1990; (Letter CACI to RDG Group September 27, 1990, attached to RDG Statement Exhibit JC-6.) The letter acknowledges that the source code contained a notice that it was owned by PTI.

7. Larry Dean, one of the CACI employees who worked the MENTIX Project, confirmed the transfer in an affidavit dated May 24, 1994, ("CACI-Dean 1994 Affidavit") as follows:

> "8. This was the first time that CACI had possession of or access to MENTIX, At O'Brien's direction, CACI made one copy, returned the original to O'Brien, and placed CACI's copy in the company vault for safekeeping. *CACI took possession of a copy of MENTIX pursuant to the Teaming Agreement which entitled CACI to retain a copy of MENTIX so that CACI would be able to perform any contract which the AMC might award to CACA as prime contractor even if BTI/EOSD/O 'Brien were incapable of performing their duties as a subcontractor under the Teaming Agreement*", (Exhibit B, emphasis added)

Source Code Given Only to CACI

9. According to RDG, no other copies of the source code of MENTIX necessary to develop the 3090

Version of MENTIX was given any one other than CACI after the 1990 seizure.

"Q. Did you enter any similar arrangement with anyone else in breach of [the CACI/ RDG Teaming] agreement?

A. No.

Q. So you only dealt with CACI for the purposes of the Army?

A. Yes.

Q. Did you deal with anybody else, any non-government?

A. No.

Q. So as far as you were concerned, it was CACI or nobody?

A. Right. (at pp. 47-48)

Q. And you don't recall ever giving the product to anybody other than CACI if you did or did not give it to them?

A. That's correct, right.

Q. And, just to follow that point, if you go on to the statement of work page. Go back to the – that page there. The one that's marked page 9. It says, "In no event shall either party to this Agreement grant licenses in source code form without the prior written approval of the other party."

A. Okay.

Q. Do you recall ever granting a license in source code form to anybody else other than CACI, if you did or did not?

A. No.

Q. And do you recall CACI ever coming to you asking you to do the reverse, we want

to give it to somebody else?

A. No.

Q. So as far as you were concerned, the product would only be with CACI, the intellectual property would only be with CACI under this agreement if, in fact, it was transferred?

A. Yes. (at pp. 48-49)

Q. And your point is that in your view, given the circumstances and the fact the copy that turned up with the Army would have been an unauthorized version of MENTIX, because there was no other way it could get it

A. I don't know whether the Army has a copy or they don't have a copy.

Q. I understand that, but if they had a copy which they tested

A. My position is that basically the only use we authorized, to the best of my recollection, was the [CACI/RDG] teaming agreement. (at pp. 167)

(Relevant pages thereof are attached hereto as Exhibit C)

CACI represented it could develop the 3090 Version

9. In October, 1990, in a White Paper delivered to the AMC, CACI represented as follows:

"MENTIX could provide the environment necessary for AMC to accomplish modernization of its mission support applications within the timeframes set forth by current policy.. .The initial estimate of the time necessary to develop and deliver the prototype application is

between four and six months.

"CACI possesses sufficient corporate resources to ensure successful completion of a project of this nature, when teamed with [RDG]. CACI looks for opportunities such as this, where the edge of technology can [b]e advanced. CACI is not only willing to lead the prototype development project, but is also confident that the project can be completed within the 4-6 month duration estimate.

"CACI is in the process of consummating a cooperative arrangement with [TVA] to undertake research and development projects under the TVA's 1932 charter, which among other provisions, permits them to do work-for-others in the conduct of prototypical and R&D efforts which contribute to the overall posture of our national defense. The contract work necessary to develop the MENTIX-based prototype application could be accomplished through that relationship, especially since, the TVA will also benefit from having access to the MENTIX derivation for use in their own software modernization efforts."

(CACI AMC White Paper, October 1990 attached to RDG Statement as Exh. JC-9 p.263, the relevant pages thereof are attached hereto as Exhibit D)

Development on MENTIX-MYS Continued

3. On January 15-16, 1991, a meeting was held between RDG Group and CACI at RDG Group's New Haven Office. The Agenda for that meeting is titled "MENTIX-Demonstration of Capabilities" and in a hand written note, faxed to RDG Group on January 15, 1991 from CACI, Larry Dean of CACI,

in response to the Agenda, added the following items:

"Items of Particular Interest (Mentix)

- Mentix Language facility

- - Interface to DBMS

- - Assembly/complier (Language Processor)

- DBMS Engine

- Data Management technique

- - Interface(s) with host IOCS

- - How object orientation is accommodated

- - Interactivity with data dictionary

- - Ability to array data across physical devices

- - Importation/Exportation Facility

- - Save/Restore recovery features."

4. As indicated by the Agenda, [i]n the five months since the CACI/RDG Teaming Agreement, considerable development work had been done.

(Dr. Shaumyan Statement Exh.I , the relevant pages thereof are attached hereto as Exhibit E)

RDG and CACI agree on an AT&T 3B2 MENTIX Version

5. CACI and RDG entered into a Memorandum of Understanding dated July 8, 1991. Included in the Memorandum were the following provisions:

3. [RDG] will make available to CACI, at no cost, a General license for MENTIX software which will execute on an AT&T 3B2 platform. ...

5. It is envisioned that the General License issued to CACI will be for a term of one (1) year and will be automatically renewed, at no cost, unless notified in writing by [RDG]

Further, specific terms and appropriate licensing schedules will be provided to CACI which permit CACI to sub-license Mentix Processor licenses.

7. CACI and [RDG] intend to negotiate, upon mutually acceptable terms, a Lease-with-purchase-option" rental agreement for use by CACI of the 3B2-500 owned by [RDG]. Both parties agree to accommodate a provision in that rental agreement for access to and use by, [RDG] of the computer system once installed on CACI's premises....

The Memorandum indicates that Mentix-MVS is covered by a separate agreement (Par. 6), and states further, in a footnote, that Mentix belongs to RDG.

RDG Statement Exh. JC- 15, the relevant pages thereof are attached hereto as Exhibit F)

On August 19, 1991, RDG advised Q'Nia[1] of CACI's licensing of MENTIX.

CACI's Further Development Work.

6. Pursuant to the Teaming Agreement, CACI itself, along with RDG, worked on further develop of MENTIX, and acquired additional copies of the software.

"In order to optimize Mentix product familiarization time **of our four person team**. [i.e., three software engineers and a project manager] we'd like to reproduce 3 copies of the documentation which you furnished...." (Emphasis and parenthetical added)

Larry Dean of CACI Memo to RDG. December 12, 1990 (Exhibit F)

7. RDG responded accordingly.

"... Please accept this as authority to reproduce '3 copies of the documentation' we furnished under our cover letter dated December 7, 1990, and our authority to use such "to optimize MENTIX familiarization time" by your four person team...."

Permission was given by RDG Group to CACI on December 14, 1990 (Exhibit E)

8. CACI' s development work continued even though it was aware of RDG' s dispute with PTI concerning ownership of MENTIX. RDG' s recent evidence is that Dr London and Mr. Elephante and other people from CACI told RDG that the Terming Agreement should proceed based on the warranties that RDG had given that RDG had title to the product and that the team shouldn't be dissuaded by threats from PTI.

Q. Once again to your recollection, by that time [July 8, 1991] had the 3090 version been developed to your knowledge and ported?

A. I have no knowledge of the 3090 version being developed. (at pp. 128-129)

Q. Did you – by this stage, to your recollection, did you receive any monies from CACI or anybody for the use of MENTIX?

A. No.

Q. And I think your evidence has been that you never received anything, so, even though I'm asking the question – the reason I'm asking you is, given this information that I'm now showing you, does that change your recollection?

A. No. No.

Q. You never received a dime?

A. That, I think, I would remember. (at pp. 131-132)

Q. ... did you discuss with [Jack] London, [Jefi] Elefante or the other people in CACI how the [title] dispute was to be resolved under the teaming agreement?

A. I'm sure that I did, yes.

Q. Can you remember, in general terms, what the terms of the deal to resolve the dispute were?

A. Basically that they should proceed based on the warranties that I had given that we had title to the product and that they shouldn't be dissuaded by threats from Baird and Leiser; if Baird and Leiser wanted to file lawsuit that I would have to defend it

(at pp. 148-149)

Deposition Robert O'Brien November 2002 the relevant pages thereof are attached hereto as Exhibit C)

July 1991 Business Case Refers in Detail the 3090 Version of MENTIX.

9. In the Business Case entitled "***Business Case for the Incremental Re-engineering of AMC's Mission Essential Software Systems***", prepared by CACI and submitted to AMC in July 1991, there were numerous references to MENTIX, including the following:

a. "Approximately 60 % of the expected project cost of this program is for COTS software licenses and porting fees. The COTS

licenses include a DBMS for both the MVS and Unix platforms, a CASE Toolsuite, ***and an MVS Version of MENTIX***..."

b. "Transformation of the DCS Application from COBOL to Mentix in the MVS environment:

This phase of the reengineering project is roughly equivalent to the Code and Unit Test Phase of a traditional "forward" engineering effort. ***The Mentix application environment will be employed for this prototyping effort as it has an implementation in both a Unix and MVS platform environment'***

c. Platform to be used for development was to be an ***AT&T 3B2*** multi-user platform (computer) using ***Unix*** platform.: (Business Case at p.17)

d. Deliverables Phase II: one licensed copy of ***MENTIX-MVS***, p.21 of the Business

e. Deliverables Phase III, one 60 day licensed ***3B2 Unix version of MENTIX*** copy

f. MENTIX to ADA translation would be demonstrated on a ***3B2*** machine.

(Emphasis added, the relevant pages thereof are attached hereto as Exhibit G)

9. CACI Identified TVA as Vehicle for Funding the 3090 Porting Project

10. Prior to the 1990 seizure, CACI set out to PTI how the TVA was to be the vehicle for the development of the 3090 MENTIX Version.

"...[W]e have had our first formal contact with the Tennessee Valley Authority (TVA) regarding their Technology Brokering Pro-

gram as the contracting vehicle to support the Army funded MENTIX porting project. Upon Senior Army Staff identifying their funding mechanism, AMC procurement personnel will rapidly meet with TVA to finalize the Army-TVA support agreement. My estimate of the time interval between our formal presentation and a filly executed contract vehicle and the beginning of work is 2-3 weeks. I also estimate that the budget for the project will approximate $500,000. ***This project is a major step towards our targeted market of 40,000 IBM mainframes in the world...***"

(Larry Dean, CACI letter to PTI dated July 26, 1990, the relevant pages thereof are attached hereto as Exhibit H; all TVA emphasis references are added)

11. The Teaming Agreement itself made specific reference to the TVA as follows:

> 1. General Undertaking. The U.S. Army Material Command and the Tennessee Valley Authority (collectively, the "Customer") have expressed an interest in having the parties to jointly prepare and submit a proposal for winning a research and development contract ... in support the patties efforts to port MENTIX to the IBM 3090 MVS/CICS platform environment ('MENTIX-MVS') ... (Exhibit A)

12. CACI also made reference to the TVA in the White Paper as set out in paragraph 9 above.

IBM/CACI and Others Team for SBIS Contract.

13. CACI teamed with IBM for Sustaining Base Information Services ("SBIS") contract, from the be-

ginning in early 1992. At the time, as stated further below, CACI issued the [CONFIDENTIAL] Termination Letters to RDG and P11. The SBIS contract was let in June 1993, (the relevant pages thereof are attached hereto as Exhibit I). Judgment was entered in this case in August 1993.

14. In the SBIS Contract, (and in addition to four other US related contract), CACI (as a subcontract to the IBM) represented that it had successfully completed the "RAPID ISM/MISM" development for the HQDA (Edgar Brasseur's Office) during the period February 7, 1991 to December 20, 1991. CACI represented that it had developed 22 applications for a cost of $344,000 "original contract performed within budget". (the relevant pages thereof which are subject to a Confidentiality Agreement are attached hereto as Exhibit J)

15. In response to a subsequent enquiry from the SBIS Source Selection Evaluation Board, on 10/05/92, CACI also stated that while the US was the same customer, the work was performed "under another contract number TV-86856V between [TVA] and CACI.... within budget." It is possible that other Contracts referred to in the SBIS contract may also have been funded through TVA. (The relevant pages thereof which are subject to a Confidentiality Agreement and the Affidavit of the Project Manager of SBIS, are attached hereto as Exhibit K)

16. 23. On November 8, 1993, after CACI had been notified about the Judgment entered in this case, Dale Howell, a Senior Subcontract Administrator of IBM wrote to Debbie Mays, Contracts Manager of CACI, and ordered the following

"Even though the CACI RENovate (TM) process was described in the SBIS Technical Proposal as a reengineering approach that could be used within the SBIS solution, *IBM FSC directs that this process NOT be used for any purpose under the SBIS contract unless express written authorization has been first obtained by CA CI from IBM* "(italics as in the original, the relevant pages thereof are attached hereto as Exhibit L)

One of the principal "tools" of RENovate was MENTIX.

17. It is undisputed fact that without RENovate, including MENTIX, no modernized software was ever delivered under the SBIS Contract, which was cancelled in 1997 after at least $209,000,000 of taxpayers' money had been paid to the non-performing contractors.

18. On the other hand, CACI has been involved in several mega-project purportedly using "RENovate" and other unidentified tools, awarded to modernize COBOL code including the following;

A. **CACI's $66M subcontract with VGS Inc.** to provide information processing support services to the Federal Systems Integration and Management Center (FEDSIM) Federal Information Processing Support Services program. to provide information technology services including reengineering, across all federal agencies, and is the preferred vehicle to fulfill National Performance Review mandates to integrate information technology into the way the government does business. CACI will provide its systems reengineering, and software reuse processes and

tools that help organizations "manage technology change by protecting existing technology investments while migrating to powerful new technology environments" and uses CACI's reengineering methodology "to preserve the usable capabilities of current systems while transitioning them to new environments" and its software reuse technology which "implements the systematic reuse of software components and code throughout an organization, reducing the risks and costs of software and systems development." CACI noted that "its ... solution will enable FEDSIM clients to migrate their information systems to new and more advanced technology environments – without having to start from scratch – ." (PR Newswire, January 3, 1996);

B. **CACI alliance with PKS Information Services, Inc. (PKS)**, a subsidiary of Peter Kiewit Sons', Inc., one of the largest privately held companies in the U.S., to market legacy application software migration and systems reengineering solutions in the commercial marketplace, focusing on attacking high-end reengineering challenges. CACI licensed it systems reengineering methodology to PKS and partnered with PKS to deliver the systems reengineering methodology solutions to customers in a variety of industries. PKS and CACI also agreed to jointly invest in expanding other elements of their already extensive reengineering capabilities and agreed to jointly develop a "Reengineering Clinic" with CACI's methodology and associated process and simulation tools, and other legacy software migration toolset and using

CACI's extensive workforce trained in its methodology, which when combined with PKS's data center, computer processing, and systems integration resources yields a systems reengineering capability that is "unequaled in the marketplace." (PR Newswire, September 10, 1996);

C. **CACI's $110.9 Million Contract for Information Technology Support Services** Contract by Department of Justice referred to as ITSS 2001 ,which provides for "services that advance the use of existing systems, improve and streamline them, develop new applications, and introduce new technologies. While specific goals focus on enabling DOJ organizations to meet the anticipated demand for systems development and automated data processing, the program is also open to all other federal agencies." The contract provided for the use of reengineering methodology, (PR Newswire September 23, 1996);

D. **CACI's (with Lockheed Martin) Contract with the Office of the Secretary of Defense (OSD)** Program Analysis and Evaluation Office to provide support to the Joint Warfare System (JWARS) development including the providing of "reengineering methodology [to] ensure the efficient and cost-effective analysis, capture, and reuse of legacy system code, services, and tools." (PR Newswire, May 19, 1997);

E. **CACI's contract to Support Naval Information Systems Management Command,** Washington, D.C. with Lockheed Martin (which "continues [CACI's] long-standing relationship with the Navy and Lockheed Martin") under which CACI will provide information technology

support services to the Navy's Space and Naval Warfare Systems (SPAWAR) Command, located in San Diego, California and serving the Navy and Marine Corps. to maintain and enhance SPAWAR's information systems infrastructure applying its reengineering methodology to SPAWAR legacy systems to enhance and expand their capabilities. We look forward to helping modernize the Fleet and its supporting information infrastructure, and are proud to have this opportunity to provide our military with the cutting edge in technology innovation and performance." (PR Newswire August 13, 1997);

F. **CACI's $58 million Contract to Support Navy Fleet Material Support Office** Information Technical Support Services of the Fleet and Industrial Supply Center Norfolk Detachment Philadelphia undertaking activities using including "systems reengineering methodology, capable of bringing Navy systems into powerful new environments without incurring the cost and time of totally new development", (PR Newswire, September 11, 1997);

G. **CACI's partner's Quality Consulting Services (QCS), MatriDigm** "highly automated factory solution" project on Northrop Grumman's Data Systems and Services Division ("DSSD", who has "established relationships with the military and other federal customers"), "significant mission-critical subsystem applications" containing more than 20 million lines of COBOL code. .(It was reported that "[a]fter successful completion of a benchmark test case, the DSSD witnessed how the ... process verified

that the code was modified correctly".) (PR Newswire September 18, 1997);

H. CACI's partner's MatriDigm's IBM COBOL Code Renovation Project for Wells Fargo; (PR Newswire; August 3, 1998)

CACI's Purported Termination of the Teaming Agreement

19. In January 1992, CACI sent termination letters to PTI and RDG, which were sent at the same time as CACI was entering into a joint venture with IBM to "win" the SBIS Contract. CACI wrote Robert O'Brien as follows:

"Dear Mr. O'Brien:

Thank you for meeting with us on January 16 to discuss our teaming agreement for marketing MENTIX to the U.S. Army Materiel Command (AMC.) **[no mention of TVA, which was also defined as the "Customer"]**

This confirms our understanding and agreement that (1) our mutual efforts have not resulted in a contract with AMC **[Again, no mention of TVA]**; (2) there is no evidence of continuing, active interest in the product on the part of AMC; and (3) the term of the Teaming Agreement has expired **[This was inaccurate. The Agreement automatically renewed for one year in August 1991 Par. 15(d)]**. Accordingly, our teaming relationship is terminated without further obligation on the part of CACI, INC. - FEDERAL, Expert Objective Systems Development Corporation, or Baird Technologies, Inc. We are providing notice of this termination to John C. Baird by separate correspondence.

In light of the foregoing, CACI has discontinued all further efforts or undertakings as expressed in the Memorandum of Understanding relating to MENTIX entered into between CACI, INC. - FEDERAL and Expert Objective Systems Development Corporation on July 8, 1991. **[This related to the AT&T 32B Version of MENTIX]**

Enclosed are copies of the MENTIX™ documentation and 'source code on diskette. No other copies are in CACI's possession. **[No mention is made of MENTIX-MVS, which had been under development for one and a half years, and which the Government had tested]**

We regret that the opportunity to sell MENTIX did not materialize as we all had hoped. As we discussed, we look forward to exploring other potential business opportunities with you." (Emphasis and commentary added)

Letter CACI to RDG, January 20, 1992

Copy attached the RDG Group Deposition Exhibit 21 and hereto as Exhibit M

20. CACI then wrote to me as follows:

"Dear Mr. Baird:

This letter is in reference to a Teaming Agreement entered into by CACI, INC. - FEDERAL, Baird Technologies, Inc. and Expert Objective System Development Corporation dated August 15, 1990 (the Teaming Agreement) and serves as CACI's response to your letters, dated September 30, and October 7, 1991, regarding matters associated with the agreement.

Based on my review of the facts, I have made the following findings: The Teaming Agreement was for the purpose of securing a contract with the U.S. Army Material Command (AMC) to port the MENTIX software product to an IBM 3090 MVS/CICS platform environment **[no mention of TVA]**. Pursuant, to the goals of the Teaming Agreement and in recognition of the fact that no formal procurement action for MENTIX" was in execution, CACI marketed MENTIX to AMC and submitted a business case to AMC for its consideration. These actions' constituted the best way that CACI knows of to generate with AMC a formal procurement action. Nonetheless, no solicitation has been issued from which a contract could result, not has AMC exhibited any active interest in entering into a contractual relationship with CACI for porting MENTIX. **[no mention of the fact that MENTIX had already been ported, or the CACI/IBM teaming agreement]**

We, therefore, consider that our Teaming Agreement has expired without result **[no mention of the software derived from MENTIX, i.e., MENTIX-MVS]**, and the teaming relationship is terminated without further obligation on the pa[rt] of CACI, Inc. - Federal, Expert Objective System Development Corporation, or Baird Technologies. Inc. We regret that the opportunity did not materialize as we all had hoped.

We have provided notice of this termination to Robert A. O'Brien by separate correspondence and have returned all proprietary

MENTIX" material in CACI's possession to' him". **[again, no mention of MENTIX-MVS]**

(Emphasis and commentary added)

Letter CACI to PTI dated January 21, 1992

Copy Attached to RDG Group Deposition Exhibit 22 Copies of the letter is attached hereto as Exhibit N)

21. It is unclear under the terms of the CACI/RDG Teaming Agreement what should happen to the MENTIX-MVS, which several software engineers had developed, which had been tested by the Government according to Edgar Brasseur and which was apparently developed further under a contract with TVA.

22. What is clear is that three years after the software was forcibly taken from it, PTI never received back in accordance with the Court's Judgment any copies of MENTIX-MVS or the AT&T 32B Version of MENTIX.

Evidence of Jurisdiction Over CACI

23. Attached hereto as Exhibit 0, is evidence relating to CACI's presence in this State, including authorization to do business, including authorization to do business as a foreign corporation and a press release indicating that CACI has managed, and my still manage, the records of the Civil Division of the Department of Justice in New York.

/s/

John Cameron Baird

Sworn to before me this
14th day of April, 2006
NOTARY PUBLIC

/s/

HOUSTON G. GRANVILLE
No. 01GR6094827
Notary Public, State of New York
Qualified In Bronx County
My Commission Expires June 30,2007

2. AFFIRMATION OF JOEL Z. ROBINSON IN REPLY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, *Plaintiff,* –against– CACI INTERNATIONAL INC., ET AL., *Defendants.*	93 Civ. 8512 (MBM)
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, *Plaintiff,* –against– CACI INTERNATIONAL INC., ET AL., AND THOMAS M. MARSHALL *Defendants.*	94 Civ. 0441 (MBM)
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, *Plaintiff,* –against– J.P. LONDON, *Defendant.*	94 Civ. 8164 (MBM)

REPLY AFFIRMATION OF COUNSEL IN SUPPORT OF MOTION TO VACATE

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK)

I, JOEL Z. ROBINSON, an attorney duly admitted to practice before the Courts of the State of New York and this court, hereby affirms under the penalty of perjury as follows:

1. I am a member of the Bar of this Court and practice with the firm of Law Offices of Joel Z. Robinson, and have been counsel for the Plaintiffs in the above-entitled action and I am familiar with all the facts and circumstances in this action and all other actions arising out of the seizure of Plaintiffs software in New York, in August, 1990. I am also the solicitor-advocate of record for the Plaintiffs in a High Court action undertaken in England. I have full knowledge of the facts of these cases and I am duly authorized to make this affidavit by the Plaintiffs. Insofar as the contents of this affidavit are noted herein to be within my personal knowledge, they are true; otherwise they are true to the best of my knowledge information and belief.
2. This Affidavit is presented in Reply to respond to factual allegations made in the Memorandum in Opposition filed on December 22, 2006 by counsel for Defendants, ("Opp.") which are disputed in fact.

CACI's continued concealment of key evidence; Efforts to Obtain truth thwarted.

3. In its Opp., CACI23 pleads that "Pentagen could have taken Mr. Brasseur's deposition during dis-

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[23] Words and expressions have the same meaning as set out in the Judgment or pleadings.

covery in 1994..." in the Virginia action in 1994 and "has never offered any explanation for that failure". (Opp. at 25). For the reasons set out below, such a claim, at this time, is scurrilous.

4. Pentagen first commenced action against CACI to recover all copies of its software in New York in August 1993 as Pentagen's right title and interest was confirmed. (Opp. at 2) At the same time, Pentagen sought to obtain information as to any and all other uses of the stolen software from both the U.S. and CACI. In furtherance thereof, Pentagen issued a FOIA Request, dated August 24, 1993 (Exhibit 1)[24], addressed to the U.S. for the attention of "Edgar Brasseur", which sought any and all information on MENTIX. On September 10, 1993, a response was received (Exhibit 1) informing Pentagen that the matter had been referred to Corporate Information Office "for action". Pentagen was unaware if any action was ever taken, because it received no further response thereto.
5. In September 1993, I expressed concern to CACI's counsel, that MENTIX was being used by CACI, and on September 10, 1993, CACI's counsel, Steptoe & Johnson (as it was then constituted), wrote to me (Exhibit 2) informing me as follows:

> ....With respect to your general concern that CACI is in some way using MENTIX in connection with RENovate, I have told you that my information indicates that your concern is simply unfounded and wrong....

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[24] Copies of all documents included herein are attached hereto in the Exhibits in almost chronological order ("Exhibit").

From that point on, CACI's continually stated that it never had any interest in MENTIX.

6. In December 1993, after this action (which had been commenced on July 9, 1993, within three years of the seizure) had been removed from the New York State Supreme Court to this court, CACI commenced its "split-off' action in Virginia, arguing that because it had returned the software, there could be no copyright infringement for mere marketing of software25.
7. In its Va. Complaint, (Exhibit 2) CACI acknowledged that "O'Brien provided a copy of the MENTIX computer software to [CACI]" (p.15.) and that "[i]n January 1992, [CACI] returned the copy of MENTIX to O'Brien."
8. In the Va. Complaint, CACI also alleged that (para 51) "..., IBM has informed CACI that it should not use CACI's RENovate process in connection with the SBIS Contract...."
9. CACI's position throughout was, as stated in its Va. Complaint, that it had returned to Runaway the only copy of the software it had, and that it had made no derivative version thereof, and its position was reflected in Judge Brinkema' s decision in August 1994. Notwithstanding CACI's [mis]-representations, Pentagen undertook discovery in the litigation, and independently, on that issue. At the time, it obtained or had obtained a copy of a Memo which CACI had prepared when it was introduced to MENTIX by Pentagen as early as March 30, 1990 (Exhibit 3), and copies of some of CACI' s marketing material used through 1990-1, including the "White Paper" and the July 1991

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[25] It also made other claims including statute of limitations.

Business Case to the U.S. which included multiple references to "MENTIX". Together, I viewed the documents as presenting CACI' s interest in the software and it seemed inconceivable to me that the later documents would have been prepared for and submitted to the U.S. unless the development work called for under the Runaway/CACI Teaming Agreement had been completed.

10. By December 1993, when no further response to the August 1993 FOIA Request had been received[26], it appeared to me that CACI may not have been fully frank with me as to the situation. On December 23, 1993, Pentagen wrote a letter to IBM and each of the contractors demanding that they "cease and desist" from using MENTIX, together with a demand for compensation. Thereafter, on January 4, 1994, a similar Demand was made of the U.S. On January 7, 1994, IBM responded by providing assurances that the software being used did not infringe the MENTIX product. The U.S. responded similarly by letter on January 11, 1994. (Exhibit 4)

11. Because the U.S. and the contractors' s responses had been carefully crafted, on March 24, 1994, Pentagen issued a Subpoena to the U.S. (and to others) demanding all information about the software and seeking discovery of (inter alia) all documents relating to any test of MENTIX. (JCB Aff. Mukasey Exh. 3). I reviewed the documents made available by the U.S. in response to the Sub-

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[26] In hindsight, Steptoe & Johnson's communication with Mr. Brasseur on December 20, 1993, "re communications with Pentagen" (JCB Mukasey Aff. Exh. 2,) was intended to "neutralize" Mr. Brasseur, be-cause no further response was received by Pentagen.

poena, but no substantive information was produced. No information relating to any transfer or test of any version of MENTIX was forthcoming in response to that process

12. The possibility that a fraud was being committed intensified, because it seemed to me that Pentagen was being "stonewalled". Even though discovery continued, immediately after the U.S. failed to produce any information in response to the Subpoena, (on or before April 12, 199427), I returned to New York and contacted the FBI by telephone in New York. On April 14, 1994,1 met with an FBI agent. (The FBI Report of the meeting dated April 18, 1994 obtained later under a later FOIA Request is attached (Exhibit 5)). On April 21, 1994, Pentagen filed a lawsuit (under seal) under the False Claims Act, in New York.28 (Exhibit 5).

13. It was clear to me from April 1994, that any evidence submitted by either CACI or the U.S. in any litigation would be suspect, because, at the time, the U.S. and CACI had represented to me and to the court throughout, that there was no derivative version of the software, and that all versions of the software had already been returned by CACI to Pentagen or Runaway.

14. On May 6, 1994, CACI again assured me and the court that it never had possession of the CASE-

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[27] It was also obvious that the U.S. and CACI were coordinating their responses to me because immediately after I had "secretly" telephoned the FBI, Steptoe & Johnson faxed me a letter dated April 12, 1994, threatening me (Exhibit 5).

[28] The FBI wrote (Exhibit 5) on May 23, 1994, merging its investigation with the FCA action.

tools, (such as MENTIX), (CACI letter dated May 6, 1994 attached (Exhibit 6)).

15. Thereafter, in August 1994, Judge Brinkema[29] granted summary judgment in favor of CACI, based (inter alia) on CACI's representations, that there were no derivative versions of the software and the CACI Expert Report, based on the returned, undeveloped, UNIX version of MENTIX, and the judge ruled that marketing software, without more, does not amount to copyright infringement.

16. In reality, in 1994, there was no basis to depose Mr. Brasseur because all witnesses, including the U.S. had represented in court filed documents, in unison, that there was no derivative version of the software.

Post 1994 Brasseur Evidence

17. The False Claims Action was unsealed in May 1995, and the U.S. declined to intervene. Pentagen decided to proceed without the U.S. and made its own enquiries. On June 16, 1995, the U.S. Attorney in this district placed itself between any communication between Pentagen and the Executive Branch, including Mr. Brasseur, (Exhibit 7)[30] and effectively made any further enquiry of the U.S. impossible from that point on.

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[29] It was later discovered the judge's husband, John Brinkema, a computer expert with the Administrative Office of the U.S. Courts, previously, "had authorized an unrelated contract to CACI and had pursued an interest in computer translation software" Mukasey Dec at [* 18]

[30] Pentagen then approached Congress, and in June 1995, was invited to meet with the members of the House of Representative Appropriations Committee, Investigations and Surveys Group and exchanged information.

18. In the meantime, this action continued. The ink was hardly dry on Judge Mukasey's July 1996 Order in this action, when, on August 14, 1996, Mr. Brasseur signed a Witness Statement relating to the seizure ("1996 Witness Statement") (Exhibit 8) which was then filed in an English action in January 199731. Upon receipt of the 1996 Witness Statement, Pentagen then filed a FOIA Request (which was addressed to Mr. Brasseur because he had signed the 1996 Witness Statement for the U.S.), dated February 3, 1997, (Exhibit 10) again seeking similar information to that it had previously sought. Mr. Brasseur again failed to produce any record of the Secret Test. In his Responses dated March 12, 1997 and March 28, 1997, (Exhibit 10) he stated that no records were found even though he had prepared the 1996 Witness Statement on behalf of the U.S. only six month earlier.

19. Because of the recalcitrance of the U.S.32 to clarify the conflict between the evidence contained in the 1996 Witness Statement (which, for the first time, suggested a second un-divulged secret test),

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[31] In subsequent litigation, it was admitted that, at that time, the English Defendants had met with Steptoe & Johnson, in Washington and "as a result of these meetings, it was determined that E.F. Brasseur, ..., had information which would defeat Pentagen's claims in the [English] Action.... [t]he [1996] Witness Statement" (Exhibit 9)

[32] In documents subsequently obtained in response to a further FOIA Request and otherwise, it was established that, throughout this period, CACI and the U.S. and others were secretly coordinating all their responses to any and all claims being made by Pentagen arising out of the possible use of the software. At least 800 pages of material was released which contained what could only be described as litigation misconduct on the part of the defendants.

and, for example, the favorable evidence of Mr. Varnado (Mukasey Dec [*4]), in April 1997, Pentagen commenced action in the U.S. Court of Claims under Claims Court Rule 2733 and immediately sought to depose Mr. Brasseur.(copy of Motion under Rule 27 attached (Exhibit 11)).

20. Clearly, my interpretation of Mr. Brasseur's 1996 Witness Statement caused concern for CACI, because on April 14, 1997, Steptoe & Johnson LLP wrote to me (letter attached (Exhibit 12)) giving a seriously-strained interpretation of the words the U.S. had used in the 1996 Witness Statement.[34] In a series of correspondence from April 17 to May 8, 1997, (Exhibit 12) Steptoe & Johnson attempted to convince me that there had been only one test, which was the Varnado Test, and that there was no other test. In addition, Steptoe made serious threats to me in its defense of the Witness Statement, in order to make me agree with them that there could have only been one test, and not, as it was later discovered to be true, two.

21. Immediately thereafter, the U.S. Attorney in this district reiterated the "ban" on me as to any communication with members of the Executive Branch, (even though CACI's counsel seemed to have been permitted to meet with Mr. Brasseur), and later certified Mr. Brasseur under 28 C.F.R. § 15.3. (Exhibit 13). In 1999, the Federal Circuit denied the effort.

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[33] A complaint containing allegations, commenced seeking the supporting evidence.

[34] Steptoe & Johnson LLP had told the English Defendants that the U.S. had evidence that could defeat Pentagen's claims in England!

22. On September 7, 1999, Pentagen sought approval from the U.S. Attorney in this district (copy attached (Exhibit 14)) to depose Mr. Brasseur in relation to the 1996 Witness Statement, and on September 21, 1990, Pentagen's request was denied (copy attached (Exhibit 14)). Pentagen then turned to the English High Court where Mr. Brasseur's 1996 Witness Statement had been originally filed.
23. Under an November 18, 1999 order of that court (Transcript of the Decision of Master Moncaster attached (Exhibit 15)), a Letter of Request was issued permitting Pentagen to cross examination Mr. Brasseur as to the evidence the U.S. had submitted to that court in the 1996 Witness Statement.
24. The Cross Examination took place in Virginia in 2000. At that time, Mr. Brasseur divulged that a derivative 3090 version of the MENTIX software had been developed, which had been tested, and which had achieved the same reuse results as had been set out for the software that had been promised by CACI under the SBIS Contract. The 2005-6 Decisions of Judge Sprizzo held that CACI had transferred the derivative version to the U.S. Just as I had suspected, CACI and the others had presented false evidence to the courts.
25. In each of the cases referred to in CACI's 20-odd page recitation (Opp. 2-21), decided prior to obtaining of Brasseur 2000 evidence, it is obvious that, as a matter of fact, had neither CACI nor the U.S. not concealed that fact that CACI had transferred a copy of the derivative 3090 version of the stolen software which the U.S. had tested, the courts would have come to very different decisions. It has now been accepted by Judge Sprizzo in his June 2006 Order, (and is not denied by CACI nor its

counsel) that prior to the commencement of this litigation, i.e. prior to 1993, CACI transferred possession of the 3090 derivative Version of the stolen software to the U.S.

26. Since obtaining the 2000 evidence through the English Court, I have been sanctioned by this district court under Rule 11 and other provisions, ordered to pay CACI's costs amounting to $75,000, (which I am unable to do), and am not permitted to represent my client in these actions in courts.

Affirmed under the penalty of perjury.

Dated: New York, NY
January 12, 2007

/s/
Joel Z. Robinson

3. EVIDENCE FILED AS TO CACI'S COUNSEL'S CONDUCT

a. CACI's Complaint in EDVa filed December 23, 1993

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CACI INTERNATIONAL INC.	)	
1100 North Glebe Road,	)	
Arlington, Virginia 22201	)	
and	)	
CACI, INC.-FEDERAL	)	
1100 North Glebe Road,	)	
Arlington, Virginia 22201	)	
Plaintiffs,	)	C.A.No.93-1631A
v.	)	

PENTAGEN TECHNOLOGIES)
INTERNATIONAL, LTD.)
430 East 86th Street)
New York, New York 10028,)
BAIRD TECHNOLOGIES, INC.)
430 East 86thStreet)
New York, New York 10028,)
JOHN C. BAIRD)
430 East 86th Street)
New York, New York 10028,)
MITCHELL R. LEISER)
330 West 58th Street)
New York, New York 10017)
Defendants.)
)

COMPLAINT

Plaintiffs, CACI International Inc and CACI, Inc.–Federal ("CACI–Federal") (collectively "CACI" or the "Company") allege as follows:

Nature of the Action

This is an action for (a) a declaratory judgment pursuant to 28 U.S.C. § 2201 seeking a ruling that certain marketing .... [-5-] research and development Contract with the AMC to port the MENTIX software product to a IBM 3090 MVS/CICS platform environment The objective of the Teaming Agreement was to cause the AMC to initiate a procurement action.

13. A Teaming Agreement was Signed by CACI with BTI on July 31, 1990, but was never signed by BTI.

14. On information and belief, in or about July 1990, control of BTI shifted from Baird and Leiser to Robert O'Brien, who is a resident of the Common-

wealth of Virginia. O'Brien then proceeded to offer licenses to MENTIX through BTI and, derivatively, through a corporation controlled by him, Expert Objective System Development Corporation ("EOSD").

15. On or about August 15, 1990, CACI–Federal entered into a Teaming Agreement with BTI, EOSD and O'Brien to attempt to prepare and submit a proposal for a research and development contract with the ANC to port the MENTIX software product to a IBM 3090 MVS/CICS platform environment. (Exhibit A). The objective of the Teaming Agreement was to cause the AMC to initiate a procurement action. In the Teaming Agreement, BTI, EOSD and O'Brien represented and warranted to CACI-Federal that they had good title to or adequate right to license MENTIX. The Teaming Agreement provided that it was to be governed by Virginia law. Pursuant to that Teaming Agreement, O'Brien provided a copy of the MENTIX computer software to CACI-Federal.

16. In or about July 1991, CACI submitted a "Business Case" to the AMC which provided a technical approach to an engineered software conversion, which technical approach employed...[-7-]

17. The AMC never solicited a proposal to perform work, never initiated any procurement action, and never allocated funds for a contract that related in any way to MENTIX.

18. In January 1992, CACI-Federal terminated the Teaming Agreement with BTI, EOSD and O'Brien, and returned the copy of MENTIX to O'Brien.

19. Pentagen has publicly alleged in a lawsuit filed in July 1993 in the Supreme Court of the State of

New York, *Pentagen Technologies Int'l. Ltd. v. CACI International Inc., et al.*, Index No. 116709/93, that CACI's marketing activities to the AMC constituted a conversion of MENTIX. CACI has moved to dismiss that action on the grounds, inter alia, that the claims for conversion are preempted by the copyright Act, depriving the state court of subject matter jurisdiction....

CACI's Proprietary Methodology

24. RENovate is a trademark of CACI used in connection with a proprietary methodology. RENovate is a proprietary tool- independent methodology that salvages the functional logic from existing software systems, decomposes it into abstract specifications, adds functional capabilities and technologies, and exploits computer Aided System Engineering (CASE) tools to capture the specifications and generate a new software system. RENovate is a precise set of procedures, approaches, and disciplines used by CACI to decompose a system into its lowest levels of granularity and then regenerate the system in an engineered software environment. RENovate was initially conceived and developed by [-15-]

----------/s/----------

J. William Koegel, Jr
Christian R. Bartholomew
Virginia Bar #27744
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6411
Counsel for Plaintiffs

b. Letter CACI's Counsel to PTI's counsel Sep-

tember 10, 1993

[Letterhead]

Steptoe & Johnson
Attorneys at Law
J. WILLIAM KOEGEL JR.
(202) 429-6408

September 10, 1993

BY TELECOPY

Joel Z. Robinson, Esq.
Joel Z. Robinson & Co.
110 Wall Street
New York, New York 10005

Re: *Pentagen Technologies International, Ltd. v. CACI International Inc. et al.*, No. 116709/93 (Supreme Court of New York)

Dear Joel:

In our recent conversations you have expressed a concern that MENTIX, or some component of MENTIX, is in some way being used by CACI in connection with CACI's RENovate process. understand that this assumption is predicated on certain documents which supposedly evidence some connection between MENTIX and RENovate.

You have provided me with a one–page document which reflects the purported MENTIX-RENovate connection, but we have not been able to identify it. As a result, I have asked you for additional information to assist us in responding to your concerns, both generally and with respect to the document. You have declined to supply any additional documentation and have stated that you do not know what project or proposal the one-page document relates to.

With respect to your general concern that CACI is in some way using MENTIX in connection with RENovate, I have told you that my information indicates that your concern is simply unfounded and wrong. To demonstrate that, I have asked you to identify the information which Pentagen would need to assure itself that CACI is not using MENTIX in connection with RENovate (or in any other way), and have offered to provide such information to you and Pentagen, subject to appropriate

Joel Z. Robinson, Esquire
September 10, 1993
Page 2

protection for CACI's proprietary material. You have responded to this .offer by sending me a Press Release which you plan to issue at 4:30 today. Your Press Release is false and irresponsible, and CACI will hold you and Pentagen accountable for it.

Sincerely,

/s/

J. William Koegel, Jr.

c. Letter from CACI's Counsel to PTI's Counsel dated 12 April 1994

[Letterhead]

Steptoe & Johnson
Attorneys at Law
J. WILLIAM KOEGEL JR.
(202) 429-6408

12 April 1994

BY TELECOPY

Joel Z. Robinson, Esq.
Joel Z. Robinson & Co

110 Wall Street
New York, New York 10005

Re: *CACI International Inc, et al. v. Pentagen Technologies International Ltd. et, al.*; No. 93-1631-A (E.D.Va.)

Dear Joel:

Our information indicates that you have turned over documents to the Federal Bureau of Investigation that were produced subject to the Protective Order entered by the Court in the above-captioned case. If our information is inaccurate, please notify me no later than 12:00 noon on Wednesday, April 13, 1994. If we do not hear from you by that time, we will presume that our information is accurate and take appropriate legal action.

You have also violated the Court's March 25, 1994 Order by failing to provide the required answer to Interrogatory No. 10 by April 5, 1994. Please let me know by noon tomorrow if you will provide the required answer by close of business tomorrow. If you persist in refusing to answer, we will take appropriate legal action.

Sincerely,

------/s/----------

J. William Koegel, Jr.
JWKjr./inbl

cc: Gregory E. Stambaugh, Esq.
Christian R. Bartholomew, Esq.

d. Memorandum Report of FBI prepared April 18, 1994 relating to PTI's Complaint

[FBI logo]

Memorandum

To: DADIC, NEW YORK Date 4/18/94

From: SSA [redacted] JR. (C–4)
Subject: UNSUBS,
EMPLOYEES OF CACI INCORPORATED,
1100 NORTH GLEBE ROAD,
ARLINGTON, VIRGINIA 22102.;
FAG–DOD;
00: NEW YORK

The purpose of this memo is to initiate a preliminary inquiry into whether or not employees of the above captioned company illegally obtained licensed software. and sold it to the United States Army, Army Material Command (ANC), in Alexandria, Virginia, in fulfillment of a contract far services with them.

On Thursday, April 14, 1994, writer met with JOEL Z. ROBINSON, Attorney, 110 Wall Street, 27th floor, New York, New York 10005-3801, telephone number (212) 344–2040. Mr. ROBINSON represents PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED (PTI) and BAIRD TECHNOLOGIES INTERNATIONAL LIMITED (BTI), each of which are British companies. Those companies do business at 430 East 86 Street, Suits 9, New York, New York. JOHN BAIRD is the Chief Executive Officer of each company and uses telephone number (212) 988-0073. PTI purchased the right to use software called Q'Nial and later developed that product into another product called Mentix.

In 1989, RUSSELL VARNADO, an employee of AMC, had occasion to review Mentix for use in conversion of the computer language Cobol into Ada. For many years, the military has been trying to find an efficient way of performing this task. Cobol has been in use for 20 or 30 years, and its conversion to Ada is

currently being done through hand entry, by employees or contractors of AMC. When Mr. VARNARDO learned of Mentix, he did an evaluation of the product and found that 4.2 months of hand conversion could be done in 2.8 weeks, using Mentix. With certain changes, Mr. VARNADO was prepared to initiate the purchase of MENTIX for use by AMC.

2 – 206
1-SSA [Redacted]
206- NEW

For a variety of reasons associated with the registration of PTI and BTI as foreign companies, an American company was sought cut for what is referred to as a teaming agreement. One such company was CACI. In late July, 1990, a draft teaming agreement was prepared, listing CACI and BTI, and EXPERT OBJECTIVE SYSTEMS DEVELOPMENT CORPORATION (EOSD), the expected successor to BTI, as the teaming partners. Prior to that date, BAIRD had not heard of EOSD. E0SD is an entity created by ROBERT O'BRIEN, then doing business at 4620 LEE HIGHWAY, SUITE 202, ARLINGTON, VIRGINIA 22207.

On 8/13/90, an emergency meeting of BTI shareholders was called, and through what was described as a hostile takeover, including the use of armed guards, ROBERT O'BRIEN seized the Mentix software and the computers on which it was housed, from the offices of BTI in New York City. On 8/15/90, ROBERT O'BRIEN initiated a teaming agreement with CACI in the name of EOSD and BTI.

By September, 1990, it was clear that MO wanted to move forward with the use of Mentix.

CACI, in a letter dated 9/27/90, addressed to ROBERT O'BRIEN, EXPERT OBJECTIVE SYSTEMS DEVELOPMENT CORPORATION and BAIRD TECHNOLOGIES INCORPORATED, advised him that the company had become aware of a problem concerning the ownership of proprietary rights to Mentix. In response to that letter, O'BRIEN wrote to CACI on October 1, 1990, instructing CACI not to have any further conversation with JOHN BAIRD or MITCH LEISER, regarding their relationships with BTI or CACI. Despite all this activity, CACI trademarked Mentix in October, 1990, in contradiction to the teaming agreement which was signed.

In July or August, 1991, CACI submitted a proposal to ANC listing Mentix as part of the proposed project. In September, 1991, Mr. VARNADO learned of the continuing dispute over the proprietary interest of Mentix, and expressed the Opinion that he was disappointed, since AMC had set aside money to purchase the software.

The money set aside for the project had been obtained, and was expected to be let through a GSA/CACI existing contract.

206–NEW

In late September, 1991, BAIRD spoke with Dr. JACK LONDON, Chairman, President and CEO, of CACI. During this conversation, BAIRD told LONDON that CACI should not use Mentix because of a dispute over its ownership, and LONDON reported that he had never heard of Mentix. BAIRD confirmed this conversation in writing to LONDON in a letter dated September 30, 1991.

As the dispute over the use of Mentix continued in February, 1992, ROBERT O'BRIEN returned the title of Mentix to PTI.

Nevertheless, CACI continued to use Mentix in projects which it was submitting for proposal to AMC. One such contract known as the Sustaining Base Intelligence Systems (SBIS) was proposed in June, 1993.

In December, 1993, PTI, through its attorney, ROBINSON, notified all vendors of the SBIS that PTI had a continuing interest in Mentix which was an underlying component of CACI'S portion of the project. He told them any use of this product without proper licensing would be illegal.

At this point in time, ROBINSON has no firm information indicating that AMC has paid any money for SBIS or any other program utilizing Mentix. He does believe, however, that there has been a clear-cut attempt by people not licensed to use Mentix to continue to use it, and to offer it for sale to the United States Government in violation of the rules of such projects.

The purpose of the preliminary inquiry would be to determine whether or not officials at CACI defrauded the United States Government by improperly using Mentix. Questions worth answering are: (1) Did CACI purchase the use of Mentix, or simply acquire it without payment for use in its projects? (2) Has the United States Army paid any money to CACI associated with the use of Mentix? (3) And finally, has CACI misled its team members in SBIS as to their ability to perform this contract legitimately?

ROBINSON indicates he has additional confidential information which he may be able to. release to

the FBI once permitted to do so by the United States Court Judge in the Southern District of New York civil suit. He will advise our office as soon as he has a determination on that issue.

Case is to be opened and assigned to Special Agent [redacted] for preliminary inquiry. Attached for the information of the file and the case agent is a copy of:

206–NEW

1. Letter dated 9/27/90 from CACI to Mr. ROBERT O'BRIEN.
2. Letter dated October 1, 1990 from Mr. O'BRIEN, to CACI.
3. Letter dated September 30, 1991, from JOHN C. BAIRD, to Dr. JACK LONDON, of CACI.
4. Letter dated January 20, 1992, from CACI, to Mr. ROBERT A. O'BRIEN.
5. Memorandum to the United States Army, and to CACI, titled, "Acknowledgement [sic] of Title," and signed by ROBERT A. O'BRIEN.
6. News wire article, dated July 6, 1993, regarding CACI and IBM handling SBIS
7. Article dated June 25, 1993, indicating IBM FEDERAL SYSTEMS COMPANY wins SBIS contract.
8. Letter dated, December 23, 1993, to all Contractors associated with SBIS, from JOEL ROBINSON on behalf of PTI.

e. May 6, 1994 Statement from CACI's Counsel re: CACI software:

[Letterhead]

Steptoe & Johnson
Attorneys at Law
J. WILLIAM KOEGEL JR.
(202) 429-6408

6 May 1994
BY TELECOPY
Joel Z. Robinson, Esq.
Joel Z. Robinson & Co
110 Wall Street
New York, New York 10005

Re: *CACI International Inc, et al. v. Pentagen Technologies International Ltd. et, al.*; No. 93-1631-A (E.D.Va.)

Dear Joel:

This letter is in response to your letter of May 5, 1994, requesting that we produce certain software described in your letter. Your letter request reflects either: a) your continuing lack of understanding of the AMC and SBIS matters; b) a continuing, deliberate attempt to twist and misrepresent those issues; or c) a combination of the above.

We have told you, time and time again, that CACI's RENovate methodology is just that, a methodology. It is <u>not</u> a piece of software. The references in the pages of the AMC and SBIS material cited in your letter are quite clearly, references to the methodology and not references to any particular software. As we stated in our April 28, 1994 Memorandum in Opposition to Defendants' Mod on to Compel, the software delivered pursuant to the contracts involving CACI's RENovate methodology was delivered to the customers on those contracts and not retained by CACI. We informed Magistrate Judge Jones of this orally during the hearing on April 29, 1994. We further represented that the documents relating to the contracts on which CACI's RENovate methodology was used, which you have identified, were produced to you and reviewed by you. Those materials identi-

fied the CASE tools which were used in connection with CACI's RENovate methodology on those contracts. I informed Magistrate Judge Jones that I would check with CACI to determine whether CACI had

Joel Z. Robinson; Esq.
6 May 1994
Page 2

possession of any of those CASE tools, I have done just that and learned the following: CACI does not have those CASE tools and, in fact, did not itself license those CASE tools. Rather, the customers on the contracts using the RENovate methodology licensed the CASE tools directly,

Sincerely,

-----/s/----

J. William Koegel, Jr.
JWKjr./mbl

cc: Gregory E. Stambaugh, Esq.
Christian P.. Bartholomew, Esq.

f. Time Sheets Attached to affidavit of CACI's Counsel's Affidavit dated July 8, 1994 filed in E.D.Va action

DATE	HOURS	DESCRIPTION
12/09/93	3.50 hrs.	Research complaint against Pentagen to be filed in the E.D.Va U.S. District Court.
...		
12/15/93	1.50 hrs.	Prepare for interview with [redacted] re Pentagen allegations and business activity; prepare for conference with Messrs. London and Elefante [CACI officers] re Pentagen federal

DATE	HOURS	DESCRIPTION
		court action and preliminary strategy re same.
12/15/93	2.50 hrs.	Conduct interview with [redacted] conference with Messrs. London and Elefante re Pentagen federal court action and preliminary strategy re same.
12/16/93	3.00 hrs.	Research and draft complaint against Pentagen
...		
12/20/93	7.00 hrs.	Telecon with Mr. Brasseur (AMC) re communications with Pentagen; continue drafting of complaint against Pentagen; telecon with Mr. Elefante re draft complaint.
...		
12/22/93	6.00 hrs.	Finalize and file complaint in E.D.Va. U.S. District Court. against Pentagen; telecons with Messrs. Elefante and Davis re draft complaint
...		
03/17/94	...	Outline Reply Memorandum in Support of Motion to Dismiss or Transfer.
03/17/94	4.00 hrs.	...; correspondence with Pentagen counsel re production of MENTIX computer software; telecon with Mr. Elefante re same; ...; telecon with Mr. Elefante re [redacted]; telecon with Dr. Rotenstreich re same;

DATE	HOURS	DESCRIPTION
...		
03/18/94	5.00hrs	Correspondence to Pentagen's counsel re production of computer software; review correspondence from Mr. Robinson re same; ... ; assemble and transmit [redacted] to Dr. Rotenstreich for review;
...		
03/21/94	8.00 hrs	...; monitor receipt of MENTIX computer software by local counsel;....
03/22/94	.00 hrs	...; telecon with Mr. Ferguson re SBIS software development methodology plan; transmit information to expert witness;
...		
03/25/94	3.00 hrs	... ; telecon with Colonel O'Brien re subpoena received by ISSAA; review ISSAA subpoena; ....
03/30/94	3.00 hrs	Telecon with Colonel O'Brien re ISSAA response to Pentagen's document subpoena; telecon with counsel [redacted]....
03/31/94		...; telecon with Dr. Rotenstreich re [redacted] ....
04/01/94	4.00	... ; review list of questions prepared by Dr. Rotenstreich;
...		
04/04/94	8.00	... ; telecon with Messrs. [redacted] re Pentagen inquiry re AT&T computers; telecon with

DATE	HOURS	DESCRIPTION
		Mr. O'Brien's counsel re same;
...		
04/05/94	6.00	... ; letter to Mr. Robinson re CACI non-possession of Pentagen AT&T computers; telecon with Mr. Elefante re same;
...		
04/06/94	6.00	... ; telecons with Mr. DeFee and Dr. Rotenstreich; transmit additional materials to Dr. Rotenstreich.
...		
04/08/94	7.00	Transmit [redacted] to Dr. Rotenstreich; ....
04/12/94	6.00	...; review materials offered by Dr. Shaumyan and transmit to Dr. Rotenstreich; telecon with Dr. Rotenstreich re his analysis; .... telcon with counsel for LORAL re Mr. Robinson's communicating information to the FBI; telecon with counsel for ISSAA re same; ....
04/13/94	8.00	... ; telecon with Mr. Rotenstreich [redacted];
05/12/94	5.00	...; transmit [redacted] to Dr Rotenstreich;
5/31/94	5.00	...; draft Affidavit re same and transmit to Mr. DeFee for review;

...

g. Dr. Rotenstreich's Invoice produced by CACI's Counsel in affidavit filed in E.D. Va

dated July 8, 1994.

"Invoice Date: Tuesday, June 21, 1994

From: Shmuel Rotenstreich
11934 Bargate Court
Rockville, MD 20852
301-650-2508

To: J. William Koegel, Jr.
STEPTOE & JOHNSON
1330 Connecticut Avenue
Washington, DC 20036-1795

Work done: Software Technology Consulting on the CACI vs. Pentagen law suit

Hours worked: 207 (breakdown provided separately)

Total: $25,875.00

Work Breakdown

HOURS	DESCRIPTION
45	Evaluation of Software Methodology Plan, SBIS RFP, SBIS CACI Proposal, CACI-Mentix material
11	Mentix Installation on UNIX and MS-DOS
20	Experimentation with Mentix and program written in Mentix
22	Installation and evaluation of Q'Nial 4.1
29	Running *diff* on Mentix and Q'Nial and detailed examination of the differences
46	Writing four reports: Mentix evaluation, SBIS and Mentix, Genotype evaluation and Mentix and reengineering
19	Sitting in on depositions
15	Miscellaneous - meetings, question preparations, library search.
207	Total

h. Attachment of material sought from AISSAA under Subpoena dated March 24, 1994 re-

turnable April 1, 1994.

Attachment to Production and Inspection Command contained in Subpoena issued on Subpoena Form in *CACI Intern., Inc. v. Pentagen Technologies Intern., Ltd. et al.*, (E.D.Va; NO. CIV.A.93-1631-A), on March 24, 1994 by PTI and addressed to Govt. (Contracts Office/Army Information System Selection Acquisition Agency, Building 220 STOP 393, Fort Belvoir, VA 22060.

ATTACHMENT A

9. All documents. relating to the RENovate product described in the SBIS Program or MENTIX product including:
   a) any documents relating to the development, operation, presentation, and marketing of RENovate or MENTIX either by IBM or CACI or any other person ;
   b) all documents which explain or specify a description of the product; or products to be developed by CACI and or IBM for the Software Reuse Approach (described on page 4-92 of the SBIS Work Statement), the Reengineering Methodology (p 4-137) or the Conversion Methodology(p 4-141) and the design or development discussion(p 4-149) any other work performed or to be performed by CACI and/or IBM relating to the Software Reuse Approach, the Reengineering Methodology, the Conversion Methodology or the design or development discussion for the SBIS Proposal or described as to developed or performed in the SBIS Work Statement that is patterned on the RENovate process and that can achieve the results claim or otherwise;

c) all documents which explain or specify the description or descriptions of the two or more products developed or used by CACI and others for the Air Force Combat Ammunition System and the Air Force Standard Supply System that demonstrated substantial benefits to DoD from reuse referred to on pages $4-95 and 4-139 of the SBIS Proposal;

d) all documents which describe in detail any protected or copyrighted interest claimed by CACI in the material presented to Army Material Command in 1990 and 1991 or for the SBIS Program;

e) all documents that describe any products available commercially or otherwise referred to in the SBIS Program which execute on a program which runs POSIX compliant UNIX;

f) all documents, that describe any products referred to in the SBIS Program which execute on a platform that is compliant with FIPS-151-I POSIX;

g) all documents that describe any products referred to in the SBIS Program which generate ADA compliant with FIPS 119; and

h) all documents relating to either Runaway Development Group S.A., Robert A O'Brien, Expert Objective Systems Development Inc, Thomas M. Marshall, Robert S Pollock, John C. Baird, Mitchell R. Leiser, Pentagen. Technologies International Ltd, Baird Technologies Inc, N.S.L. Ltd, United states Army Material Command, or Russell Varnado which make reference to MENTIX, CACI or RENovate.

2. All reports, evaluations, reviews, assessment, and opinion made by or for IBM or CACI or DoD regarding MENTIX, RENovate or any other Software Reuse Approach, Reengineering Methodology, Conversion Methodology or the design or development discussion for the SBIS Proposal or described as to developed or performed in the SBIS work statement that is patterned on the RENovate process and that can achieve the results claim or otherwise related product referred to in the SBIS-Program.
3. All documents relating to any and all marketing efforts to DoD or others relating to the CACI or IBM RENovate or similar products or any products patterned thereon.
4. All documents accompanying the delivery of any product to be delivered under the SBIS Contract,
5. A copy of any product owned, used by licensed by or to CACI or IBM or DoD referred to above or which are or were marketed by or used by CACI or IBM in any presentation made by CACI with IBM/Loral to DoD including but not limited to computer software, source code, executable object code and the system documentation and related information.
6. All background material provided by CACI and/or IBM on the RENovate or MENTIX product.
7. All marketing material relating to RENovate or MENTIX received prior to the issuance of the Request for Proposal for the SBIS Program or prior to the letting of the SBIS contract.
8. List of any or all Government personnel who were involved with the marketing of RENovate by CACI or IBM under the SBIS program,

9. List of any and all IBM personnel who were involved with the marketing of RENovate by CACI or IBM to SBIS for the SBIS program.
10. Any written description of the solicitation of products, methods and services issued prior to or as part of or to be delivered as compliance with the SBIS program.
11. Documents describing the performance, testing, planned or performed, undertaken prior to, during, or after issuance of the SBIS contract, which verified CACI's and IBM's claims that are or were based on the product patterned on RENovate as set out in the SBIS Work Statement.
12. Documents showing that CACI had complied with the software compliance requirements of the Request for Proposal, and any and all documents supporting the technical review.
13. All documents which described how the services required to be performed by the software patterned on CACI's RENovate process were performed prior to the SBIS contract.
14. Documents describing the form of inducement thee was given by CACI, IBM or any other person, to the Army or DoD, that encouraged SBIS to let the SBIS contract to IBM using CACI's products patterned on CACI's RENovate product.

The SBIS Proposal made by I.B.M. and / or CACI responsive the SBIS Proposals Preparation Numbered paragraph 1.4.4. (Software Development Methodology Plan) 1.4.5.7 (Software Organization and resource Management), 1.4,5.8 SBIS Subcontracting Management Plan, and 1.4.6. Software Capability Evaluation (SCE)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing be served upon:

Christian R. Bartholomew
J. William Koegel, Jr.,
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington D.C. 20036

by first class mail, postage pre-paid with a copy via fax to Fax number (202) 429-3902, this 28th of March, 1994

s./J.Z.Robinson

APPENDIX E
ADDITIONAL EVIDENCE FILED IN SUPPORT OF MOTION UNDER RULE 60(B)(6)

1. FOIA REQUEST DATED AUGUST 24, 1993 REQUESTING MENTIX TEST RESULTS (FILE COPY) AND RESPONSE

PENTAGEN TECHNOLOGIES INCORPORATED
430 EAST 86TH STREET SUITE 9D
NEW YORK, NEW PORK 10028
TEL: (212) 988-0073
FAX: (212)879-6385

August 24,1993

Edgar Brasseur
GM15 CIS
Army Materiel Command
Room 4E22
5001 Eisenhower Ave
Alexandria, VA 22333.

Dear Sir:

Re: FREEDOM OF INFORMATION ACT ("Act")
REQUEST

This corporation hereby makes formal request to you to release to us, material held by any department over which you have authority, relating to the following matters that are permitted to be released to us under the Act,

This request is made for all documents, letters, presentations, records notes of meetings, communications, memoranda, or any other material, prepared or dated from June 1989 to date, that make any reference in any way to any one or more of the following:

a) CACI International Inc, or CACI-Federal, Inc,

b) Pentagen Technologies International Limited,

c) Baird Technologies Inc,

d) Expert Objective Systems Development Corp,

e) Runaway Development Group,

f) Mr. Robert A O'Brien,

g) software program known as MENTIX, in any form, and h) a software program known as RENovate, in any form,

Could you also please supply a copy of DMR 923.

Please advise us of the copying and other costs relating thereto, and forward all documents to our attorneys, Law Offices Joel Z. Robinson & Co, 110 Wall Street New York, New York, 10005-3801; Tel:(212) 344 2040; Fax (212) 344 3070: Attention Joel Z. Robinson. Please accept this letter as your authority to discuss any item relating to this request with that firm.

Thank you for you assistance in this matter.

Very truly yours

Mitchell R. Leiser
President

Department of the Army
Headquarters, U.S. Army Materiel Command
5001 Eisenhower Avenue,
Alexandria, VA, 22333-0001

September 10, 1993

INCPA
Mr. Mitchell R. Leiser
Suite 9D
430 East 86th Street
New York, New Pork 10028

Dear Mr. Leiser

This office has received your request of August 24, 1993, for information under the Freedom of Information Act.

Your request has been referred to the Corporate Information Office, this Headquarters, for action.

If you have any questions regarding this matter, Mr. John M. Gorgas is the point of contact in this office and can be reached at Area Code 703-274-8019.

Sincerely

s./John M. Gorgas
For Donald P. Kirchoffner
Chief of Public Affairs

◆——◆——◆

2. LETTER FROM IBM TO CACI DATED NOVEMBER 8, 1993 RE: USE OF RENOVATE ON SBIS PROGRAM

[Fax Marks at Head: Apr 20'94 10:35 FR CACI INTERNATIONAL 703 522 6895 to 202 8293654-9025 P.02/02.

Nov 9 '93 16:21 FROM DEPT 832 PAGE 002]

[IBM Logo]

International Business Machines Corporation
Federal Systems Company

Route 17 C
Owego, New York, 13827-1296

Letter #93-DEH-184

November 8, 1993

CACI Inc – Federal
1100 North Glebe Road
Arlington, VA, 22201

Attention: Debbie Mays, Contracts Manager

Subject: Use of CACI's RENovate (TM) on the SBIS Program

Reference:

Dear Debbie.

Even though the CACI(TM) process was described in the SBIS Technical Proposal as a re-engineering approach that could be used within the SBIS solution, IBM FSC direct that this process NOT be used for any purpose under the SBIS contract unless express written authorization has first been obtained by CACI from IBM.

Please contact me with any questions on the above.

Very truly yours

s./Dale Howell
Dale Howell
Senior Subcontract Administrator

[Plaintiff's Exhibit 276]
**Total Page 002 **

◆——◆——◆

3. Letter from FBI to Counsel dated May 24, 1994 re DoJ's Investigation Activities

[Logo]

U.S. Department of Justice
Federal Bureau of Investigation

26 Federal Plaza
New York, New York 10278

May 23, 1994

In Reply, Please Refer to
File No.

Joel Z. Robinson
Attorney at Law
27th Floor
110 Wall Street
New York, New York 10005-3801

Re: CACI INC.
1100 North Glebe Road
Arlington, VA 22101

Dear Mr. Robinson:

On May 18, 1994, Supervisory Special Agent Robert E. Lee, Jr. of our Office met with Assistant United States Attorney (AUSA) David Koenigsberg of the Civil Division, Southern District of New York. Mr. Koenigsberg is charged with the responsibility of determining whether or not the United States Government will represent its own interest in civil action initiated by you as 94 CIV 2925.

After meeting with AUSA Koenigsberg, Supervisory Special Agent Lee found that the steps to be taken by AUSA Koenigsberg in determining the need for government intervention are the same as would be taken by our Office during the course of our preliminary inquiry. Since your suit is restrained by certain elements of confidentiality and since Civil Division is most appropriately suited to answer your suit, the FBI will be taking no further action, unless requested to do so by Mr. Koenigsberg or his office.

Joel Z. Robinson

Thank you for the opportunity of meeting with you. We appreciate your concerns in this matter.

Very truly yours,
WILLIAM A. GAVIN
Deputy Assistant Director
By: s./Timothy C. Dorch
TIMOTHY C. DORCH
Assistant Special Agent in Charge

4. "GAG" LETTER FROM U.S. ATTORNEYS' OFFICE (SDNY) TO PTI'S COUNSEL DATED JUNE 16, 1995

[Logo]

U.S. Department of Justice
United States Attorney
Southern District of New York
100 Church Street
New York, New York 10007

June 16, 1995

Joel Z. Robinson, Esq.
Law Offices of Joel Z. Robinson & Co.
67 Wall Street
New York, New York 10005-3101

Re: *Pentagen Technologies Int'l v. CACI Int'l Inc.* 94 Civ. 2925 (RLC)

Dear Mr. Robinson:

This letter relates to your recent efforts to arrange a meeting with U.S. Secretary of Defense William J. Perry "to establish the [Defense Department's] position on certain issues that are the subject" of the relator's pending application for a preliminary injunction in the above-captioned action. Plaintiff-Relator's Memorandum in support of Temporary Restraining

Order and Further Preliminary Injunction, p. 3 (June 12, 1995).

Please be advised that because there is pending a litigation that you have initiated, all communications with any Government employee concerning the lawsuit should be conducted through the undersigned, the attorney for the Government assigned to represent the Government with respect to the above-captioned action. Although the Department of Justice has declined to intervene in the above-captioned qui tam action and the relator may proceed to assert a right of the United States in the lawsuit, the Department of Justice nevertheless continues to represent the interests of the United States with respect to the matters at issue in the suit. See, e.g., 31 U,S.C. S 3730(b)(1) (qui tam suit may be dismissed only upon consent of the Court and the Attorney General); § 3730(b) (4) (B) (if Government declines to intervene, relator has right "to conduct the action"); § 3730(c) (3) (same); *Id.* (Government may intervene after it initially declined to do so). Accordingly, this Office requests that in the future you notify the undersigned in the event that you wish to communicate with any Government employee with respect to this matter. See N.Y. Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1).

In addition, by letter dated June 13, 1995, you presume to instruct me not to communicate with the defendants or their counsel in this case and that all communications between the parties should be directed through you and your office. For the reasons stated above, your demand is baseless and rejected. The Department of Justice reserves the right to communicate with any person or party concerning the matters at issue in the above-captioned action.

Very truly yours,
MARY JO WHITE
United States Attorney
By: s./David A. Koenigsberg
DAVID A. KOENIGSBERG
Assistant United States Attorney
Telephone: (212) 385-4471

cc: All Named Defendants listed on the attached (not included)
Hon. William J. Perry
David T. Cohen, Esq.
Lt. Col. Craig Wittman
Richard McGinnis, Esq.

5. CONFLICTING EVIDENCE FILED IN ENGLISH HIGH COURT ACTION

a. Letter from AMC May 17, 1990: MENTIX Evaluation.

DEPARTMENT OF THE ARMY
U.S. ARMY MATERIAL COMMAND
AMCIM-RB

17 May 90

Memorandum for Baird Technologies
(Attn: Mr. Robert S. Pollock, President)

Subject: Information Concerning the evaluation of MENTIX

With reference to the evaluation of MENTIX that was loaned to us I would like to report on my team's experience with your product.

We chose a known application in our systems development group to be the productivity improvement claims of your MENTIX product. The chosen application was recently completed using our conventional

software in 4.2 months. By the way, the four manual included with the software were most complete and very easily understood by members of my team. In fact, one of the team members commented on the time you must have spent to develop and validate the documentation to the MENTIX software. I was personally amazed to find that we did not need personal or telephone support from you in order to learn MENTIX and that we commenced this undertaking on our own, no contractor support, and completed this application successfully in 2.8 weeks. This is a direct contrast to the doubts I had during my visit to your offices earlier this year.

The staff also reported that what they liked about MENTIX was the ease of use, the fact that it's a highly predictable environment and the high productivity resulting in having to use only a fraction of the lines of code normally needed by alternative solutions.

Our evaluation platform, the AVION workstation, was a very good simulation of the normal UNIX area, but we would like to encourage you to port MENTIX to a platform equal to our IBM and all 3090 main frame platform. We base this on the current consolidation/migration strategies that require the move or revitalization of the old COBOL to either new COBOL or to ASMI standard. Although I have no authority to commit the Army, once you have accomplished this, I feel relatively secure that the Army will become a major client.

I was also very impressed with the performance gain displayed by the application development in the MENTIX environment.

Point of contact for this action, Mr. Russell D. Varnado; commercial phone number, (703) 274-8325.

s./ Russell D. Varnado
Russell D. Varnado,
Chief of Plans Branch,
Resource and Plans Division.

♦——♦——♦

b. CACI's Internal Memo dated 30 March 1990 re visit and assessment of MENTIX.

Sanitized for External Use

MEMORANDUM

Date: 30 March, 1990

To: ...

From: Larry Dean [of CACI]

Subj: Visit to Baird Technology Inc and Assessment of Their Products

....

2. There were three focuses to our visit:

o Look at and explore the potential value of BTI's current and evolving products (Mentix, Genotype);

....

The potential for [MENTIX and Genotype] is truly mind-boggling. Inasmuch as it sits atop an object oriented database management system, and the product provides the capability to use its imbedded computer language to build other languages, it would be an effective environment in which to design and develop software for parallel-processing. The range of automatic source language translators which can be constructed to migrate existing applications into the higher-productivity environments of object-orientated software designs residing in CASE environments, alone, makes this a leading edge capability-one which is not currently possessed by any other tool vendor.

....

It can be coupled to numerous CASE environments which will generate application code that is a function clone of the original source code implementation. This type of integrated CASE ReEngineering tool suite will open up the entire existing applications market for cost effective modernization regardless of the motivation to do so. Moreover, there is no competing technology for this capability available which is independent of both the current and target application systems computing platforms. This could be a real money-maker....

c. CACI's White Paper to AMC Presented October 1990

FACILITATING THE GOAL OF MODERNIZING THE ARMY MATERIAL COMMAND'S MISSION SUPPORT SYSTEMS BY THE END OF FY92

A WHITE PAPER BY CACI, Inc - FEDERAL

BACKGROUND

The DOD has directed the individual services to develop plans for either modernizing their mission support systems, or transitioning the source form of these application systems to the Ada programming language. Each service is operating under a different deadline for achieving this outcome. The U.S. Army Information Systems Command (ISC) must accomplish this action by the end of FY92.

The Plans and Programs and Architecture and Resource Division of AMC-ISCR has responsibility for development of a cost-effective action plan to achieve the all-Ada software environment or, alternatively, to modernize their existing software. There is also interest in tying their Business and Research Systems together.

THE ISSUES

All new application development projects will be accomplished using the Ada language and its associated programming support environment(s). Major modifications to existing applications, which have a net result of rewriting/modifying in excess of half an existing system, will be evaluated for complete rewrite into the Ada language (with attendant additional cost).

Existing mission support systems are written in a variety of source languages which include various versions of COBOL, (90%) FORTRAN (5%), PL-1 (5%), and Assembly languages. This further complicates planning for "pure" language-to-language translations to migrate to Ada,

Mission support systems within the AMC reside on numerous types and models of hardware platforms. The majority of the software resides on the IBM 3090 class of computing platform, of which over 150 are in operation at various sites throughout the command.

Current and forecasted ADP personnel levels are not sufficient to sustain both software/systems maintenance and modification as well as the actions necessary to either modernize or convert existing applications to Ada unless methods are found to "Work Smart". "Working Smart" demands the infusion of new methodologies and technologies which result in near-term , or immediate productivity gains of ADP personnel.

Aside from doing nothing, the choice of actions which are readily available to the ISC are:

- Redesign and Rewrite
- Reverse Engineer
- Redevelop/Resystematize

- Reengineer

Without achieving productivity gains several orders of magnitude greater than the current staff productivity, only the "do nothing" option is viable without obtaining additional personnel resources through procurement action.

A redesign and rewrite approach to achieving an all-Ada software environment is prohibitively costly, and probably cannot be accomplished in the time remaining between now and the end of FY92.

Reverse engineering of existing source code into Ada via translation process cannot be accomplished in a totally automated fashion and will require significant personnel resource expenditure to accomplish. Once accomplished, the result leaves the software maintenance staff with all the same obstacles under which they operate today - unstructured, poorly documented systems which do not exist within .any type of software engineering environment (CASE- environment) and cannot be adapted/changed in any responsive, predictable fashion.

Among the alternatives available, only those of redevelop/ resystematize and reengineer appear to be viable. Reengineering all the existing mission support systems currently in use within AMC is probably the "best" of the alternatives available, however, the size and cost of this alternative renders it an unlikely choice for achievement by FY92's end. Reengineering could be selectively applied to systems which either require frequent modifications. or which are being considered for major enhancement or modifications,

The remaining alternative, redevelopment/resystematization, could be achieved if two things happened, First, a "Work Smart' technology/methodology must be identified, which can be hosted on AMC-owned computing platforms. That technology/methodology must provide a quantum leap in productivity for the current and forecasted levels of ADP personnel. Second, a "work Smart' technology /methodology must be simple enough that it can be learned quickly in order to rapidly realize the associated productivity gains.

POTENTIAL SOLUTIONS

Recently, the AMC DCS-IM concluded an evaluation of a new technology called MENTIX. MENTIX is a proprietary product of Expert Objective Systems Development, Inc - a small high technology firm specifically incorporated to license and support MENTIX and other software. The MENTIX product is a total application environment which encompasses a multiparadigm high level language. To evaluate this product as a potential technology which might provide a suitable redevelopment/ resystemization environment, an evaluation copy was obtained and used in a "dual" application development study. A 4-man team of Army personnel developed an application using current technology and methods. The same team then developed the same application within the environment provided by MENTIX.

Extremely encouraging results were obtained. The test application was developed by the team using traditional methods and technology in just over 4.2 months. The same application was developed in MENTIX in just over 2.8 weeks. During the development in the MENTIX environment, the team did not receive any outside assistance from the product's

proprietor, nor did they receive any prior training and familiarization. The documentation accompanying the product was the only source of technical/user information available to the team. Subsequent performance evaluation of the relative performance of each of the two applications developed indicated that the version produced in the MENTIX environment performed noticeably better than the version produced using traditional technology.

While this experience was slightly skewed in favor of the MENTIX experience (the team already being familiar with the application to be developed), the apparent productivity gain in excess of 6:1 warrants further exploration. Additionally, the product proved relatively easy to learn and use, without a lengthy learning period. On the down side, the MENTIX implementation used in this evaluation was on an AVION/UNIX-OS workstation - presently there is no version which will host on AMC's principle platform, the IBM 3090.

CONCLUSIONS

MENTIX could provide the environment necessary for AMC to accomplish modernization of its mission support applications within the timeframes set forth by current policy. EOSD is willing to undertake the delivery of a MENTIX-based prototype application which will. clearly demonstrate a low-risk, cost-effective approach to incremental modernization of existing mission support systems. The initial estimate of the time necessary to develop and deliver the prototype application if between four and six months.

There are several factors which must bc considered regarding the assessment of whether or not a small, firm like EOSD could successfully deliver the

prototype project described herein. Chief among these concerns is whether or not they are financially strong enough to sustain the effort. The management of EOSD is well, aware of this concern and to overcome it, have established a strategic alliance with CACI. Inc, -Federal. CACI is an established firm which regularly undertakes software conversion, reengineering, and systems integration projects. CACI possesses sufficient corporate resources to ensure successful completion of a project of this nature, when teamed with EOSD. CACI looks for opportunities such as this, where the edge of technology can be advanced. CACI is not only willing to lead the prototype development project, but is also confident that the project can be completed within the 4-6 month project duration estimate.

CACI is in the process of consummating a cooperative arrangement with the Tennessee Valley Authority (TVA) to undertake research and development projects under the TVA's 1932 charter, which among other provision, permits them to do work-for-others in the conduct of prototypical and R&D efforts which contribute to the overall posture of our national defense. The contract work necessary to develop the MENTIX-based prototype application could be accomplished through that relationship, especially since the TVA will also benefit from having access to the MENTIX derivation for use in their own software modernization efforts.

RECOMMENDATION

The U.S. Army Material Command, in concert with the Information Systems Command, fund and sponsor a MENTIX-based prototype project to modernize an existing AMC application which will execute on the IBM 3090 platform. Further recommend

that the TVA be explored as the agency through which the project be contracted.

◆——◆——◆

d. CACI Briefing to AMC on August 5 1991 using MENTIX with RENovate

CACI, Inc. Briefing to AMC Regarding A Proof-of-Concept Reengineering Project To Prove a Business Case for the Incremental Reengineering of AMC's Mission Essential Software Systems

5 August 1991

....

Estimated Proof of Concept RENovation and Implementation Costs [in box presentation format]

[Box 1]

Original Proposal: using Oracle DBMS RENovation

MVS Oracle DBMS Suite	216.2 K
3B2 Oracle DBMS Suite	12.8 K
Mentix for MVS (Dev Suite)	220.0 K
Ada Environment for 3B2	10.0 K
DOS CASE Tool	3.0 K
Labor	500.0 K
P-O-C- RENovation Sub Total	962.0 K **
Deployment	
Oracle Run-Time for MVS (10 sites*)	1.6 M
Mentix Run Time (10 Sites)	500.0 K
Total REVovate and Deployment Cost	2.47 M

[Box 2]

Alternate Proposal: using Datacomm/DB DBMS RENovation

3B2 Oracle DBMS Suite	12.8 K
Mentix for MVS (Dev Suite)	220.0 K
Ada Environment for 3B2	10.0 K
DOS CASE Tool	3.0 K
Labor	500.0 K
P-O-C- RENovation Sub Total	745.8 K **
Deployment	
Mentix Run Time (10 Sites)	500.0 K
Total REVovate and Deployment Cost	1.25 M

* Assumes no Economies associated with Data Center Consolidations

** Proof of Concept (P-O-C) includes $171.8 Costs Associated with Demonstrations of migration to Ada Language and Unix Platform.

◆——◆——◆

e. Certificate of Secretary of State of New York re CACI Inc.-Federal 1981 Registration in New York State.

[Seal]

STATE OF NEW YORK
DEPARTMENT OF STATE
ALBANY. NY 12231-0001
ALEXANDER E. TREADWELL
SECRETARY OF STATE

JOEL Z. ROBINSON & Co.
67 WALL STREET
NEW YORK NY 10005-3101

JANUARY 31, 1996

Dear Sir/Madam,

Following is the information you requested.

CACI, INC. – FEDERAL a DELAWARE corporation received authority to do business in New York State on 09/24/1981. Its principal location is NEW YORK county.

Status:	Active
Biennial Statement Status:	Current
Service of Process Address:	C/O United States Corporation Company 15 Columbus Circle New. York, NY 10023-7773
Registered Agent Address:	United States Corporation Company 15 Columbus Circle New York NY 10023-7773
Chairman of the Board Address:	J P London 1100 North Glebe Road Arlington, VA
Business Location:	The Corporation 1100 North Glebe Road Arlington, VA 22201

Sincerely,

DIVISION OF CORPORATIONS 19960201020753

f. Govt 1996 Witness Statement filed in English Action

IN THE HIGH COURT OF JUSTICE
1993-P-No. 1802
QUEEN'S BENCH DIVISION

BETWEEN:

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED

Plaintiff

-and-

JORDAN & SONS LIMITED

First Defendant

-and-

JORDAN GROUP LIMITED

Second Defendant

CONSOLIDATED PURSUANT TO
THE ORDER OF MASTER HODGESON
DATED 18TH OCTOBER 1993
IN THE HIGH COURT OF JUSTICE
1990-P-No. 469
QUEEN'S BENCH DIVISION

BETWEEN:

PENTAGEN INTERNATIONAL TECHNOLOGIES LIMITED

Plaintiff

-and-

EXPRESS COMPANY SECRETARIES LIMITED

Defendant

WITNESS STATEMENT OF E. F. BRASSEUR

I, E. F. Brasseur of Alexandria, Virginia, WILL SAY as follows:

1. I am employed by U.S. Army Materiel Command ("AMC") as DCS Corporate Information, a position that I have held since March 1996. 1 began my employment in the AMC in March 1980.
2. During the period of 1988 to 1993, I was assigned to the Division Chief Plans and Resources Department within the AMC. My position was Chief, Plans and Resources Division. At that time I was the immediate supervisor of inter alios Russell Varnado. Mr. Varnado was a civilian whose position was a technical adviser although he, himself, was not responsible for undertaking technical evaluations. Mr. Varnado had absolutely no re-

sponsibility for the allocation or procurement of funding for contracts with the AMC, or for the awarding of contracts with or by the AMC.

3. The procedure involved in acquiring a contract with the AMC, as with any other Army Contract, is a very complex one which can be drawn out over many months or years. It would be practically impossible to describe how the process works in every situation. A crucial factor which is present in every contract with the AMC, however, is the availability of financial resources.
4. It was my duty to allocate funds from the Department of Defense's AMC budget for contractors whose proposals satisfied the AMC's technical criteria.
5. Before I would allocate funds to a project or award a contract, I would require a technical evaluation. If that technical evaluation demonstrated that the proposal did not meet the AMC's requirements, then I would not give approval for funds to be allocated or for a contract to be awarded. That would have been the end of the matter, as far any project proposal submitted to the AMC was concerned, and no contract would have been concluded.
6. I recall attending a meeting regarding MENTIX at which a presentation was made by Mr. Baird or Mr. Leiser of BTI during the 1990 time frame. At the time the AMC's programs were written in the COBOL programming language. The AMC wanted to convert COBOL to ADA, another computer language. MENTIX was represented as capable of doing this. Further, any proposal to use computer software had to be compatible with the AMC's ex-

isting framework This meant that MENTIX had to be able to port to our IBM 3090 platforms.

7. A technical evaluation was undertaken by appropriate AMC personnel. I was subsequently informed by those personnel that MENTIX could not sufficiently translate COBOL to ADA. As a result of that evaluation, I directed Mr. Varnado to inform CACI or BTI that AMC was not interested in pursuing MENTIX. That was the end of the matter as far as I was concerned.
8. Subsequently, a proposal was put forward by CACI involving MENTIX. The AMC, however, never allocated, set-aside or earmarked any funds for that proposal or in any other way relating to MENTIX
9. In the Autumn of 1991, Mr. Leiser telephoned me. He enquired as to the status of the AMC Contract with CACI using MENTIX I told him that there was no such contract nor would there be. I remember telling him that Mr. Varnado should have told him this. Mr. Leiser seemed to be flabbergasted by this news. He said that Mr. Varnado had not informed him that this was the case. I told him that Mr. Varnado had not mentioned any further developments on the CACI proposal to me since I had already rejected the proposal on behalf of the AMC.
10. I was unaware that there was a title dispute regarding MENTIX between members of BTI. I have never heard of Pentagen, the plaintiff in these proceedings.

I have read this statement and confirm that its contents are true to the best of my knowledge and belief.

dated: 14 August, 1996
Signed: s./ E.F. Brasseur
E. F. BRASSEUR

♦——♦——♦

g. FOIA Request to Department of Army dated February 3, 1997

[JZR Letterhead]

February 3, 1997

FOIA22.WP6/FCA
Department of the Army
Freedom of Information Privacy Act Office
1725 Jefferson Davis Highway
Suite 201
Arlington VA 22331-0700
VIA FAX 703 607-3450 (One page only) and MAIL

Re: 1990-1 MENTIX © PRESENTATIONS FREEDOM OF INFORMATION ACT ("Act") REQUEST

Dear Sir/Madam:

This letter is written to you further to an Act Request dated December 12, 1995, made by my client, Pentagen Technologies International Ltd and the various responses thereto. We would be pleased if you could provide us with a copy of any and all records made of any meetings or telephonic conversations between Chief, Plans and Resources Department of the Army Materiel Command ("AMC"), Edgar F. Brasseur, (the "Chief"), on the one hand, and either representatives of CACI International Inc, CACI Inc-Federal, CACI Systems Integration, Inc, or Mr. John C. Baird, or Mr. Mitchell Leiser, during the 1990 - 1991and 1996 - 97 time frames.

We would also be pleased if you could provide us with copies of any and all records which set out the results of a technical evaluation(s) made by the Plans and Resources Department of the AMC on MENTIX© on an AVION workstation prior to May 1990 or any made thereafter, including any written record between the AMC personnel undertaking the evaluation and the Chief, together with any direction from the Chief to the AMC personnel, including Russell D. Varnado, that AMC was not interested in pursuing MENTIX© and any record of rejection relating thereto.

Please advise us of the cost of this request and accept this letter as authority to spend up to $50 under the Act for such information. Thanking you for your assistance.

Very truly yours,
Joel Z. Robinson

h. Responses to the FOIA Request dated February 3, 1997

HEADQUARTERS
U.S. ARMY MATERIEL COMMAND
5001 EISENHOWER AVENUE.
ALEXANDRIA. VA 22333-000

March 12, 1997

Mr. Joel Z. Robinson
Joel Z. Robinson & Co.
67 Wall Street
New York, New York 10005-3101

Dear Mr. Robinson:

The Department of the Army, Freedom of Information and Privacy Acts Office forwarded us your February 3, 1997, Freedom of Information Act request. This request was for a copy of records made of any

meetings or telephonic conversations between the Chief, Plans and Resources Department of the Army Materiel Command and either representatives of CACI International Inc., CACI Inc-Federal, CACI Systems Integration, Inc., Mr. John C. Baird or Mr. Mitchell Leiser during the 1990-1991 and 1996-97 time frames. Also requested were copies of various information pertaining to results of a technical evaluation made by the Plans and Resources Department of the AMC on MENTIX on an AVION workstation prior to May 1990.

Enclosed are four pages of a witness statement of Mr. E. F. Brasseur. An exhaustive search of our files found no records on your request for any technical evaluations made by the Plans and Resources Department of the AMC on MENTIX on an AVION workstation.

We also contacted the U. S. IOC Industrial Logistics Center (formerly called USAMC Systems Integration and Management Activity), and the USAMC Logistic Support Activity. They both searched their files and found no records. This is not a denial of your request. If you wish to appeal this "no records" opinion,, you should, address your appeal to this Office within 20 days. Your appeal and this opinion will be forwarded to the Initial Denial Authority for a decision. The fees in this matter have been waived in [2] accordance with DOD Regulation 5400.7-R, DOD Freedom of Information Act Program

Point of contact for this action is

Mrs. Betsey Mulvaney, AMCIO-F, (703) 617-8965.

Sincerely,

----/s/--------

E.F. Brasseur

Deputy Chief of Staff for
Corporate Information

Enclosure

DEPARTMENT OF THE ARMY
HEADQUARTERS
U.S. ARMY MATERIEL COMMAND
5001 EISENHOWER AVENUE.
ALEXANDRIA. VA 22333-0001

March 28, 1997

Mr. Joel Z. Robinson
Joel Z. Robinson & Co.
67 Wall Street
New York, New York 10005-3101

Dear Mr. Robinson:

This is a follow up to our conversations on March 25 and 27, 1997, confirming we have no additional documentation or information regarding the witness statement of Mr. E. F. Brasseur, which we provided you on March 12, 1997.

Sincerely

-------/s/----------

Betsey L. Mulvaney
AMC FOIA Coordinator

i. Correspondence between CACI's Counsel and PTI Counsel, April1997 re Brasseur Evidence.

STEPTOE & JOHNSON LLP

...

J. William Koegel, Jr
(202) 429-6408

14 April 1997

Re: *CACI International Inc, et al., v. Pentagen Technologies International Ltd et al.*,
(No.93-1631-A; E.D.Va.)

Dear Joel:

This letter is in response to your letter of April 11, 1997. Mr. Brasseur's Witness Statement in *Pentagen Technologies International, Ltd. v. Express Company Secretaries limited, et al.* does not, in any way, shape or form, contradict the evidence presented by CACI in the above-Captioned action.

The evaluation of MENTIX by AMC personnel was the subject of extensive deposition testimony in this action. Pentagen's representative, John Baird, testified at length regarding AMC's evaluation of MENTIX pursuant to arrangements made by Pentagen and its subsidiary, Baird Technologies, Inc. *See* May 3, 1994 Baird Deposition at 130-134 Mitchell Leiser testified about that evaluation as well. *See* May 20, 1994 Leiser Deposition at 85-87. Russell Varnado (now affiliated with Pentagen) also testified, in substantial detail, about the AMC's evaluation of MENTIX. ,*See* April 29, 1994 Varnado Deposition at 128-148; 156-161. Mr. Varnado was quite specific about the arrangements made by Pentagen's representatives for the AMC to evaluate MENTIX. Indeed, your April 11, 1997 letter acknowledges that your clients had authorized that evaluation by AMC.

The testimony of Messrs. Baird, Leiser and Varnado is also clear on another point: CACI had no involvement in the AMC's evaluation of MENTIX. In fact, CACI's marketing activity to the AMC, as all the evidence in this case indicated, occurred *after* the AMC had performed its evaluation of MENTIX. CACI's unrebutted evidence, *e.g.* the Dean Affidavit,

demonstrated as much. Mr. Brasseur's Witness Statement is totally consistent with that chronology, stating as it does that CACI's proposal regarding MENTIX was put forward subsequent to the AMC's evaluation of MENTIX.

Joel Z. Robinson. Esquire
14 April 1997
Page 2

Given the record evidence in this case, your contortionist construction of Mr. Brasseur's Witness Statement and the suit against the United States threatened in your March 21, 1997 letter to Mr Koenigsberg. are nothing but an attempt to perpetrate a fraud. How can you conceivably believe that Pentagen can arrange for and authorize the AMC to evaluate MENTIX, and subsequently file suit based upon that evaluation?

Sincerely

-----/s/----

J. William Koegel, Jr.

.JWKjr/mbl

JZR Letterhead

April 21, 1997

017.WP6/EDVA
J. William Koegel, Jnr, Esq
Steptoe & Johnson
1330 Connecticut Ave, N.W.
Washington D.C. 20036-1796

Re: *CACI Int'l Inc, et al., v. Pentagen Technologies International Ltd* (No.93-1631-A E.D.Va.)

Dear Bill:

The contents of your letter April 14 last are noted.

Nothing in Mr. Brasseur's witness statement specifically dates the timing of the referred-to evaluation nor CACI's Presentation except the statement that CACI's presentation occurred after the AMC evaluation that established "that MENTIX could not sufficiently translate COBOL to ADA." ¶ 8. Mr. Brasseur must have been referring to another failed evaluation made after Mr. Varnado's evaluation because Mr. Varnado had reported on May 17, 1990 that his evaluation had been a success.

In any event, your interpretation of Mr. Brasseur's witness statement, which apparently was prepared by Mr. Menzies of Davies Arnold Cooper, Solicitors, England, fails to explain why CACI made a presentation to AMC to market a failed product.

Your interpretion (sic) amounts to an admission that your client's later presentations falsely misrepresented the capabilities of both RENovate™ and/or MENTIX©. It might also explain why your client, and the IBM Team, had failed to deliver a single accepted modernized software application under the SBIS program, even though paid more than $150,000,000.

Sincerely,

–/s/---------

Joel Z. Robinson

STEPTOE & JOHNSON LLP

...

J. William Koegel, Jr

(202) 429-6408

24 April 1997

Re: *CACI International Inc, et al., v. Pentagen Technologies International Ltd et al.*,
(No.93-1631-A; E.D.Va.)

Dear Joel:

This letter is to respond to your letter of April 21, 1997. You assert that Mr. Brasseur's reference to the AMC's evaluation of MENTIX, which established that MENTIX could not translate COBOL to Ada "must have been referring to another failed evaluation made after Mr. Varnado's evaluation because Mr. Varnado had reported on May 17, 1990 that his evaluation had been a success."

First, the record evidence referenced in my letter of April 14, 1997, particularly Mr. Varnado's testimony, established that the AMC performed only one evaluation of MENTIX. That evaluation, again according to Mr. Varnado showed that MENTIX could not translate COBOL to Ada. See 4/15/94 Varnado Dep. at 61-62. This testimony alone establishes that Mr. Brasseur and Mr. Varnado are talking about the same AMC evaluation of MENTIX

Your suggestion that there was another, subsequent evaluation of MENTIX, and that CACI was somehow involved is contradicted by the unrebutted Dean Affidavit which established that CACI never provided MENTIX to the AMC....

Joel Z. Robinson, Esquire
24 April 1997
Page 3

....

Fourth, your insinuation regarding the SBIS Contract reflects a willful and deliberate disregard for both the Opinions and Judgment of the United States District Court for the Eastern District of Virginia, fully affirmed by the Fourth Circuit as well as the uncontradicted facts about the SBIS Contract set

forth by the defendants in the qui tam actions filed by Pentagen.

Joel, please stop your ongoing efforts to perpetrate a fraud.

Sincerely,
s./ Bill Koegel
J. William Koegel, Jr.

JWKjr./mbl
Joel Z. Robinson, Esquire
24 April 1997
Page 4
bcc: Jeffrey P. Elefante, Esquire
George Menzies, Solicitor
David A. Koenigsberg, Esquire
Thomas J Byrnes, Esquire.

♦——♦——♦

JZR Letterhead

May 8, 1997

018a.WP6/EDVA
J. William Koegel, Jnr, Esq
Steptoe & Johnson
1330 Connecticut Ave, N.W.
Washington D.C. 20036-1796

Re: *CACI Int'l Inc, et al., v. Pentagen Technologies International Ltd* (No.93-1631-A E.D.Va.)

Dear Bill:

The contents of your letter April 24 last are noted.

Taking each issue that you raise:

First: I do not agree with you that the Statement proves your point. We all know that MENTIX could never "translate" COBOL to Ada. Mr. Varnado's report made no reference to "translate", but is very clear when it stated:

"We base this on the current *consolidation / migration* strategies that require the move or revitalization of the old COBOL to either new COBOL (ANSI Standard or to ADA". (emphasis mine)

The differences in the terminology between "modernize" "translate" and "convert" are set out in CACI's October 1990 "White Paper" which also explains the AMC requirements, the possible solutions, the MENTIX solution, Mr. Varnado's report, and CACI's representations as to MENTIX's capabilities. They are repeated in the subsequent CACI RENovate/MENTIX proposals made in 1991. Mr. Brasseur was correct when he said that MENTIX could not sufficiently "translate COBOL to ADA". MENTIX "migrated" the code.

Nor has it been alleged, yet, that CACI directly provided MENTIX to the AMC. We refer to the March 15, 1991 Memo from Larry Dean of CACI to Robert O'Brien and the Memorandum of Understanding ¶ 8. between CACI and EOSD, which plainly explains how the Teaming Partners handled the issue.

Even the Government in its latest filing acknowledges that Mr. Brasseur's statement could be interpreted as indicating "that a technical evaluation occurred no later than August 1991".

Second, whether or not Mr. Varnado thought the product was a success, Mukasey J. stated as follows:

In May 1990 AMC tested MENTIX and achieved positive results: AMC was impressed with MENTIX's translation speed and ease of use, and indicated that there was a good chance that the Army would "become a major client" (citations omitted)

Pentagen Technologies Int'l Ltd v. CACI Int'l Inc, et al. 93 Civ 8512; *Pentagen v. CACI and Marshall* 94

Civ 0441; *Pentagen v. London* 94 Civ 8164 (MBM) 1996 WL 435157, at *2

The wording of Mr. Varnado's test speaks for itself. Even CACI in the October 1990 "white paper" interpreted the results as "Extremely encouraging results were obtained" suggesting that more was to be done. Nevertheless, given the 3 rating (speed appearing to be the problem) assuming that it could only achieve 30 percent, that is 30 percent more than your client and the IBM Team has been able to achieve over the 3 year period of the SBIS Contract. Given that IBM Team was paid $150,000,000 for not a single accepted modernized programs, AMC paid nothing for 30 percent!

Your characterization of the comment that CACI falsely misrepresented the capabilities of both RENovate and/or MENTIX is insulting, given the wording of the white paper and the subsequent presentations. Irrespective of what Mr. Baird said or didn't say, the "white paper" and the presentation documents speak for themselves.

"POTENTIAL SOLUTIONS

Recently, the AMC DCS-IM concluded an evaluation of a new technology called MENTIX....

Extremely encouraging results were obtained.

MENTIX could provide the environment for AMC to accomplish modernization of its mission support applications within the timeframes set forth by current policy.

The management of [ROB] is well aware of [stated] concerns and to overcome it, have established a strategic alliance with CACI, Inc-Federal. CACI is an established firm.... CACI looks for opportunities such as this, where the edge of technology can be advanced.

CACI is not only willing to lead the prototype development project, but is also confident that the project can be completed within the 4-6 month project duration estimate.

RECOMMENDATION

[AMC] in concert with the Information Systems Command fund and sponsor a MENTIX-based prototype project to modernize an existing AMC application which will execute on the IBM 3090 platform..." (emphasis mine)

The factual basis of the remark was provided by CACI, not by others.

Fourth, mindful of the your concerns of the Opinion and Judgments to which you refer, you will find that each of the allegations made are founded on or supported by either on statements made by the courts or on documents and statements accepted by the courts. Moreover, to alleviate your concerns for the courts, you can be assured that in the event that any new evidence is discovered, my clients will be the first to move for new trials based thereon.

Your last comment is denied given the facts and evidence.

In the meantime, I am returning to you the original of page 4 of your letter April 24, which I imagine you included to me in error.

Sincerely,

---------/s/---------

Joel Z. Robinson

cc: (with copy enclosure)
George Menzies, Solicitor
David A. Koenigsberg, Esq
Thomas J. Byrnes, Esq

j. Decision of English High Court November 18,

1999 ordering the Letters of Request

Hearing on November 18, 1999 at 3.00 pm.

Present:

For Claimant	Joel Z. Robinson
For Defendants	Davies Arnold Cooper
	Alexander Hickey (Barrister)

Mr. Moncaster stated as follows:

This is an unusual application to use the Letters Of Request procedure to take the evidence of Mr. Brasseur in the United States. Mr. Brasseur provided a witness statement on behalf of the Defendants which was exchanged in January 1997 and included a Hearsay Notice, which correctly stated that Mr. Brasseur was overseas. The defendants hope that he will attend the trial to give evidence but cannot compel him and it appears to be the case that the U.S. wont allow him to attend in any event. If I take the course suggested by Defendants there will be no cross- examination and the judge will not have tested evidence upon which to base a decision. The evidence is important on the issue of whether there was a contract between Plaintiff and the AMC. Mr. Brasseur was the financial officer involved and his evidence that there was no approval and no contract, if right, would deal a knock out blow to Claimants' case.

The only way for Mr. Brasseur's to be cross-examined is by the Letter of Request procedure. It is obviously unusual for the Letter of Request procedure to be used to obtain cross-examine evidence, but normally the point can never arise if the witness is willing to be cross-examined. Also Mr. Brasseur's position in public service constricts his ability to be cross-examined. Though thought by both parties that the evidence could be given, it may not happen and

the only way the evidence can be obtained is by Letter of Request. Letters of request can be issued in the aid of justice. If it were true that using this procedure would cause gross delay and were it the case that the procedure were going to delay the trial, I would have no hesitation to deny the application. But given that the trial will not be heard until June, I don't see why the trial date would be imperiled in any way.

It is submitted that such a procedure is disproportionate, but the claim is, on its face for a very large sum of money and Mr. Brasseur's evidence is vital. It is therefore not satisfactory that it should be put into evidence as hearsay and for the judge to make what he may of it. If the evidence were peripheral, it could be simply withdrawn. The Defendants wont withdrawal the evidence which therefore shows that they view the evidence as important. I am not persuaded that the cost of traveling to the U.S. is so excessive so as to make the issuance wrong.

I therefore make the order for the issuance of the Letters of Request and order the Claimants supply a list of questions to be put to Mr. Brasseur to be submitted to this court for its approval for presentation to Mr. Brasseur. At that time, the Letters of Request should also be put to the U.S. authorities for their consideration of the issues.

[Note. E&OE: Taken from notes taken at the hearing by Claimant]

k. Relevant Portions of Cross-Examination of E.F. BRASSEUR of AMC, April 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Filed APR 25,2000
Clerk, U.S.D.C
Alexandria, Virginia

----------X

In re: LETTER OF REQUEST FROM :
THE QUEENS BENCH DIVISION :
HIGH COURT OF JUSTICE IN :
ENGLAND AND WALES. :
: Case#
: MC-00-14
E.F. BRASSEUR, Witness :

----------X

EXECUTION OF LETTER OF REQUEST

COMMONWEALTH OF VIRGINIA)
) ss.:
COUNTY OF FAIRFAX)

I, E.F. BRASSEUR, a citizen of the United States, and the person referred to in the Letter of Request abovementioned, presently residing within this District, state as follows under affirmation:

1. I have been furnished by Ms Priscilla Hopchas, the Commissioner appointed in this matter by the United States District Court for the Eastern District of Virginia, Alexandria Division ("Commissioner"), a copy of the above-captioned letter of request dated February 29, 2000, issued under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, requesting that I answer written Cross Examination Questions relating to the pending lawsuit before the Chancery Division of the High Court of Justice in England and Wales described therein.

2. Set out in the transcription attached hereto, and initialed by me, are my responses to the written questions taken before the Commissioner in this Commonwealth on April 12, 2000 and transcribed in writing thereafter.
3. I believe that the facts stated and the statements made by me, as set out in the transcription attached hereto, are true and correct.
4. I have read the transcription and I have initialed all corrections to conform the transcription to the taped recording taken of the responses.

Dated: April 25, 2000

s./ E.F. BRASSEUR
E.F. BRASSEUR

AFFIRMED before me under the penalty of perjury this 25th day of April, 2000.

s./PRISCILLA S. HOPCHAS
PRISCILLA S. HOPCHAS

The Court Appointed Commissioner in this action, A Notary Public, and A person authorized to administer the oath in this Commonwealth. My Notary Commission expires 7/31/2003

1

ORIGINAL
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

B E T W E E N:

PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD.,
Claimants

AND

EXPRESS COMPANY SECRETARIES LIMITED
Defendant

B E T W E E N:

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED

Claimants

JORDAN & SONS LIMITED

First Defendant

JORDAN GROUP LIMITED

Second Defendant

CASE NUMBER 1996. - P- 3518

CROSS EXAMINATION OF:

E. F. BRASSEUR

a witness, called for examination by counsel on behalf of the Claimants, pursuant to notice and agreement, on Wednesday, April 12, 2000, in the law offices of Paul McGlone, Esq., Suite 300, 10513 Judicial Drive, Fairfax, Virginia 22030, at approximately 10:10 o'clock, a.m., before Priscilla S. Hopchas, CVR, a Commissioner and a Notary Public in and for the Commonwealth of Virginia at Large, when there were present on behalf of the respective parties:

3

P R O C E E D I N G S

(Whereupon, the witness was sworn by the Commissioner.)

MR. ROBINSON: My name is Joel Robinson. I appear as the solicitor and attorneys for the Claimants in an English action. Ms. Hardy is with LeBoeuf, Lamb, who appears for the Defendants in the English action.

MS. HARDY: Good morning.

MR. ROBINSON: Ms. Hopchas has been appointed a Commissioner for the purposes of taking your cross examination from the Court in England.

MR. BRASSEUR: Fine.

MR. ROBINSON: There's an action in England which is pending, and the Court in England has said that they want to get your evidence as to what took place in certain circumstances, so an order was made in England, which was transmitted to the Court, the U.S. District Court, Eastern District of Virginia, Alexandria Division, and the papers were served upon you through the AMC. And I am producing the Affidavit of Service and the Subpoena.

Ms. Hopchas, I'll put that on there. Here are a couple for you. And here is a copy for you.

4

(Claimant's Exhibit No. is marked by the Commissioner and received into evidence.)

MR. ROBINSON: I would also draw your attention that the Army has, in fact, consented to your making the answers to the cross examination, and that's included on the Affidavit of Service.

The Court in England has set out the questions that are to be asked, and, for the purposes of ease, because Ms. Hopchas is taking a recording, I'11 ask the questions and you'll do the responses.

MR. BRASSEUR: Okay. ...

37

Q. 7.4: Please identify the date, content

38

of, and who prepared, the technical evaluation on MENTIX stating that "MENTIX could not sufficiently translate COBOL to ADA" to which you refer?

A. There are no written reports. From my recollection, I never saw a written report an anything.

Q. It doesn't say written.

A. I got a verbal from a couple of folks in Chambersburg [PA] --

Q. Names?

A. I believe it was Lynn Byers and possibly --

Q. How do you spell that?

A. B-y-e-r-s, L-y-n-n, Lynn Byers.

Q. L-y-n-n?

A. Yeah, L-y-n-n B-e-y-e-r-s.

Q. B-e-y-e-r-s, yes.

A. And possibly Jim Hafer. I believe that was the two individuals.

Q. Hafer, how do you spell that?

A. H-a-f-e-r.

Q. H-a-f-e-r?

A. Yes.

...

45

A. SIMA's view of MENTIX as they stated to me, said that it converted only about 50 percent of the

46

COBOL code.

...

59

Q. Isn't it true that the second evaluation – there was a second evaluation undertaken by SIMA and that MENTIX was found acceptable to AMC criteria?

A. Is the second evaluation the 3090--

Q. Yes.

A. -- or are you referring to the AVION?

Q. No, the second one.

A. The 3090 was the first evaluation, and SIMA did the 3090 evaluation. I have no idea who did the AVION. I was – I don't know anything about that one.

60

And I'm sure – I always thought the 3090 --

Q. On the machine. I mean, you're talking about a 3090 evaluation on a machine.

A. That's right. My opinion is that MENTIX was tested one time on an IBM 3090, all right.

Q. It was actually loaded on the machine?

A. Yeah.

Q. And that was before the AVION, just to get the facts right?

A. Yeah, that's my interpretation. I don't anything about the AVION.

Q. Your interpretation.

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l. Evidence of Runaway given by Robert O'Brien on November 26, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RUNAWAY DEVELOPMENT	:
GROUP, S.A.,	:
Plaintiffs,	:
against	: 91 Civ. 5643 (JES)
PENTAGEN TECHNOLOGIES INTL.,	:
Defendant	:

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Arlington, Virginia
Tuesday, November 26, 2002
Deposition of Robert A. O'Brien,

....

47

....

Q. Did you enter any similar arrangement with

48

anyone else in breach of this [CACI/RDG Teaming] agreement?

A. No.

Q. So you only dealt with CACI for the purposes of the Army?

A. Yes.

Q. Did you deal with anybody else, any non-government?

A. No.

Q. So as far as you were concerned, it was CACI or nobody?

A. Right.

Q. And you don't recall ever giving the product to anybody other than CACI if you did or did not give it to them?

A. That's correct, right.

Q. And, just to follow that point, if you go on to the statement of work page. Go back to the that page there. The one that's marked page 9. It says, "In no event shall either party to this Agreement grant licenses in source code form without the prior written approval of the other party."

A. Okay.

Q. Do you recall ever granting a license in

49

source code form to anybody else other than CACI, if you did or did not?

A. No.

Q. And do you recall CACI ever coming to you asking you to do the reverse, we want to give it to somebody else?

A. No.

Q. So as far as you were concerned, the product would only be with CACI, the intellectual property would only be with CACI under this agreement if, in fact, it was transferred?

A. Yes.

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167

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Q. And your point is that in your view, given the circumstances and the fact the copy that turned up with the Army would have been an unauthorized version of MENTIX, because there was no other way it could get it --

A. I don't know whether the Army has a copy or they don't have a copy.

Q. I understand that, but if they had a copy which they tested --

A. My position is that basically the only use we authorized, to the best of my recollection, was the [CACI/RDG] teaming agreement.

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m. Relevant Provision of the SBIS Contract

... 4.3.5.1 Software Reuse Approach

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We will achieve 40 to 50 percent component reuse in the first year, 70 percent in the second year with a target of 80 to 90 percent by the completion of the first 89 SBIS application systems at the end of year three....

n. Miscellaneous Filed Pleadings

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PENTAGEN TECHNOLOGIES	:
INTERNATIONAL LIMITED and	:
RUSSELL D. VARNADO	: FILE No.
Plaintiffs,	: 98 CIV. 1090
(JES)	:
–against–	:
	:
UNITED STATES OF AMERICA	:
First Defendants	:
	:
CACI INTERNATIONAL INC	:
CACI SYSTEMS INTEGRATION, INC:	:
CACI, INC - FEDERAL	:
INTERNATIONAL BUSINESS	:
MACHINES CORPORATION	:
LOCKHEED MARTIN CORPORATION,	:
AT&T COMPANY, PRC INC,	:
I-NET INC and STATISTICA INC	:
Second Defendants	:
	:
EXPRESS COMPANY SECRETARIES	:
LIMITED, JORDANS & JORDAN &	:
SONS LIMITED, JORDAN GROUP LD	:

Third Defendants :
:
STEPTOE & JOHNSON, and :
J. WILLIAM KOEGEL, JNR., ESQ :
Fourth Defendants :
:
DAVIES ARNOLD & COOPER, and :
GEORGE MENZIES., ESQ :
Fifth Defendants :
:
E. F. BRASSEUR :
Sixth Defendants :
----------X

MEMORANDUM OF LAW IN SUPPORT OF THIRD AND FIFTH DEFENDANTS' MOTION TO DISMISS THE PLAINTIFFS' AMENDED COMPLAINT

Of Counsel:

Thomas A. Leghorn
Brett A. Scher

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C. The Interrelationship of the Pentagen Actions in the U.S. and the U.K.

As plaintiffs state, the U.K. Action seeks damages allegedly suffered by Pentagen resulting from the Jordan Companies' "failure to perform company secretarial services including such damages that arose out of Pentagen's losses of the AMC Contract." Exhibit A, ¶ 21. In defending the UK Action, DAC learned that Pentagen had commenced a series of actions in the United States with respect to the AMC Contract (as detailed above). As Pentagen admits in its current amended complaint, it was seeking to recover the same damages in the actions pending in the

U.S. and in the U.K. (i.e., the damages arising out of the failure to procure the AMC Contract.

During discovery in the U.K. Action, DAC (as the attorneys for the Jordan Companies) met with J. William Koegel, Jr of Steptoe & Johnson (as the attorneys for CACI). As a result of these meetings, it was determined that ES. Brasseur, an employee cf the AMC, had information which would defeat Pentagen' s damages claim in the U.K. Action. Mr. Brasseur, after consulting with his attorney, signed a witness statement to be introduced into the U.K. Action (the "Witness Statement"). A copy of the witness statement is annexed to the Affidavit of Thomas A. Leghorn as Exhibit H.

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Dated: New York, New York
September 29, 1998

WILSON ELSER, MOSKOWITZ EDELMAN & DICKER LLP

By: _____/s/_____

Thomas A. Leghorn (TAL-6244)

Attorneys for Defendants

EXPRESS COMPANY SECRETARIES LIMITED, JORDANS & JORDAN & SONS LIMITED, JORDAN GROUP LD DAVIES ARNOLD & COOPER, and GEORGE MENZIES., ESQ

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